

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1168

B
Pgs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1168

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS,
Petitioner,

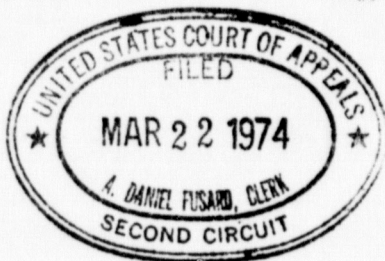
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

COLUMBIA BROADCASTING SYSTEM, INC.
NATIONAL BROADCASTING COMPANY, INC.
AMERICAN BROADCASTING COMPANIES, INC.
COLUMBIA PICTURES INDUSTRIES, INC.
WARNER BROTHERS CORPORATION
MCA INC.
TIME-LIFE FILMS, INC.
Intervenors.

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER



KATRINA RENOUF
MARGOT POLIVY
EDWARD J. KUHLMANN

Renouf, McKenna & Polivy
1532 Sixteenth Street, N.W.
Washington, D. C. 20036

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	
I. THE EVENING PROGRAMMING REQUIREMENTS RULE BEARS NO RATIONAL RELATIONSHIP TO THE COM- MISSION'S REGULATORY OBJECTIVES.	28
A. Nothing In The Present Record, The Report And Order Or The Commission's Experience Renders The Programming Requirements Rule A Rational Solution To The Problem Of Network Dominance.	28
B. The Intent And Effect Of The Programming Re- quirements Rule Is To Increase Network Domin- ance.	36
C. The Commission's Failure To Consider The Impact Of The Programming Requirements Rule On The Interrelated Syndication And Financial Interest Rules Constitutes Reversible Error.	46
D. The Commission's Explicit Resolution Of The Questions Before It In This Case In Terms Of The Appropriate Balance Between Competing Private Interests Constitutes Reversible Error.	51
II. THE EVENING PROGRAMMING REQUIREMENTS RULE VIOLATES THE FIRST AMENDMENT: 47 U.S.C. §326; AND THE LICENSING SCHEME OF THE ACT.	61
A. The Programming Requirements Rule Is In Deroga- tion Of The Mandate To Diversity Program Sources On Which The Commission Rested Its Authority To Promulgate Regulations In This Area.	61

	<u>Page</u>
B. The Programming Requirements Rule Is Unconstitutional And Unlawful Because It Imposes Specific Restraints On Speech Which Have The Intent And Effect Of Inhibiting Rather Than Enhancing Speech Generally And Of Undermining Licensee Responsibility.	65
C. The Programming Requirements Rule Is Anti-Competitive.	73
D. The Several Provisions Of The Programming Requirements Rule Exempting Network Programs By Type Are Unconstitutional In Substance And Intent.	77
III. THE EFFECTIVE DATE PROVISION OF THE EVENING PROGRAMMING REQUIREMENTS RULE IS INDEPENDENTLY UNREASONABLE IN LIGHT OF THE COMMISSION'S CONTINUING INTENT TO ENCOURAGE INDEPENDENT SYNDICATION IN THE REMAINING CLEARED TIME.	91
CONCLUSION	100

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>American Airlines v. CAB</u> , 359 F.2d 624 (D.C. Cir. 1966).	29, 30
<u>American Ship Building Co. v. NLRB</u> , 380 U.S. 300 (1965).	45
<u>American Trucking v. A.T.&S.F. Ry. Co.</u> , 387 U.S. 397 (1967).	34, 35
<u>Aptheker v. Secretary of State</u> , 378 U.S. 500 (1964).	
<u>Associated Press v. United States</u> , 326 U.S. 1 (1945).	29, 62, 65
<u>Bantam Books, Inc. v. Sullivan</u> , 372 U.S. 58 (1963).	82
<u>Banzhaf v. F.C.C.</u> , 405 F.2d 1082 (D.C. Cir. 1968), <u>cert. denied</u> , <u>sub nom. Tobacco Institute v. F.C.C.</u> , 396 U.S. 842 (1969).	70, 72, 81, 82, 83, 84, 85, 86, 89.
<u>Buckley-Jaeger Broadcasting Corp. v. F.C.C.</u> , 397 F.2d 651 (1968).	66
<u>Burlington Truck Lines v. U.S.</u> 371 U.S. 156 (1962).	45
<u>California Citizens Band Ass'n., Inc. v. F.C.C.</u> , 375 F.2d 43 (9th Cir. 1967).	66
<u>Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C.</u> 449 F.2d 1109, (D.C. Cir. 1971).	58, 59, 60
<u>Citizens Committee v. F.C.C.</u> , 436 F.2d 263 (D.C. Cir. 1970).	85
<u>Citizens Committee v. F.C.C.</u> , D.C. Cir. Case No. 73-1057 decided November 15, 1973.	85
<u>Columbia Broadcasting System, Inc. v. D.N.C.</u> , 412 U.S. 94 (1973).	70, 81, 82
<u>Environmental Defense Fund, Inc. v. Ruckelshaus</u> , 439 F.2d 584 (D.C. Cir. 1971).	60

<u>Cases:</u>	<u>Page</u>
<u>Environmental Defense Fund, Inc. v. U.S. Dept. of H.E.&W.</u> 428 F.2d 1083 (D.C. Cir. 1970).	60
<u>F.C.C. v. Allentown Broadcasting Co.</u> , 349 U.S. 358 (1955).	68
<u>F.C.C. v. Pottsville Broadcasting Co.</u> , 309 U.S. 134 (1940)	28, 51, 60, 67, 90
<u>F.C.C. v. Sanders Bros. Radio Station</u> , 309 U.S. 470 (1940).	68, 76a
<u>Fischer v. F.C.C.</u> , 417 F.2d 551 (1969).	70
<u>General Telephone Company of California v. F.C.C.</u> , 413 F.2d 390 (D.C. Cir. 1969)	46-47
<u>Greater Boston Television Corp. v. F.C.C.</u> , 444 F.2d 841 (D.C. Cir. 1970), <u>cert. denied</u> , 402 U.S. 1007 (1971)	34, 35, 45, 76
<u>Henry v. F.C.C.</u> , 302 F.2d 191 (D.C. Cir. 1962), <u>cert.</u> <u>denied</u> , 371 U.S. 821.	24, 68, 70
<u>Lafayette Radio Electronics Corp. v. F.C.C.</u> , 345 F.2d 278 (2d Cir. 1965).	66, 71, 88
<u>Miller v. California</u> , 413 U.S. 15 (1973).	84
<u>Moss v. C.A.B.</u> , 430 F.2d 892 (D.C. Cir. 1970).	60
<u>Mt. Mansfield Television, Inc. v. F.C.C.</u> , 442 F.2d 470 (2d Cir. 1971).	passim
<u>NAACP v. Button</u> , 371 U.S. 415 (1963)	88
<u>National Broadcasting Co. v. U.S.</u> , 319 U.S. 190 (1943)	35, 44, 46, 63, 76a
<u>Near v. Minnesota</u> , 283 U.S. 697 (1931) .	83
<u>New York Times Co. v. Sullivan</u> , 403 U.S. 703 (1971).	83
<u>NLRB v. Brown</u> , 380 U.S. 278 (1965).	45

<u>Cases:</u>	<u>Page</u>
<u>Office of Communications of United Church of Christ v. F.C.C.</u> , 425 F.2d 543 (D.C. Cir. 1969).	59
<u>Organization for a Better Austin v. Keefe</u> , 402 U.S. 415 (1971).	83
<u>Philadelphia Television Broadcasting Co. v. F.C.C.</u> , 359 F.2d 282, (D.C. Cir. 1966).	34
<u>Police Department of Chicago v. Mosley</u> , 408 U.S. 92 (1972).	80
<u>Radio Relay Corp. v. F.C.C.</u> , 409 F.2d 322 (2d Cir. 1969).	32
<u>Red Lion Broadcasting Co., Inc. v. F.C.C.</u> , 395 U.S. 367 (1969).	29, 62, 65, 66, 67, 68, 98
<u>Scenic Hudson Preservation Conference v. F.P.C.</u> , 354 F.2d 608 (2d Cir. 1965).	59, 60
<u>S.E.C. v. Chenery Corp.</u> , 332 U.S. 194 (1947).	92, 96, 100
<u>Udall v. F.P.C.</u> , 387 U.S. 428 (1967).	60
<u>United States v. Paramount Pictures</u> , 334 U.S. 131 (1947).	80, 86
<u>United States v. Storer Broadcasting Co.</u> , 351 U.S. 192 (1956).	76
<u>Volkswagenwerk v. FMC</u> , 390 U.S. 261 (1968).	45
<u>WAIT Radio v. F.C.C.</u> , 418 F.2d 1153 (D.C. Cir. 1969).	35
<u>WAIT Radio v. F.C.C.</u> , 459 F.2d 1203, <u>cert. denied</u> , 409 U.S. 1027 (1972).	35
<u>WBEN, Inc. v. F.C.C.</u> , 396 F.2d 601 (2d. Cir. 1968), <u>cert. denied</u> , 393 U.S. 914.	44

Administrative Rulings:

Page

<u>Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964)</u>	78
<u>Healey, Dorothy, 24 F.C.C. 2d 487 (1970), affirmed 460 F.2d 917 (D.C. Cir. 1972).</u>	78
<u>KMPC Station of the Stars, Inc., 14 Fed. Reg. 4831 (1949).</u>	78
<u>Network Coverage of Democratic National Convention, 16 F.C.C. 2d 650 (1969).</u>	78
<u>Option Time Case, 34 F.C.C. 1103</u>	69
<u>Paul, Mrs. J. R., 26 F.C.C. 2d 591 (1969).</u>	78
<u>Policy Statement on Comparative Hearings, 1 F.C.C. 2d 393 (1965).</u>	76
<u>Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1965).</u>	70
<u>Report on Editorializing by Licensees, 1 Pike and Fischer R.R., Part 3, 91:201 (1949).</u>	67
<u>Report and Order: Network Television Broadcasting, 23 F.C.C. 2d 382, reconsideration granted in part and denied in part, 25 F.C.C. 2d 318, affirmed sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 422 F.2d 470 (2d Cir. 1971).</u>	passim

Constitution, Statutes and Regulations:

United States Constitution, First Amendment	42, 81, 82, 95, 99
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, <u>et seq.</u>	
Section 303	28
Section 303(g)	28, 66, 76(a)
Section 307(b)	68

Constitution, Statutes and Regulations:

Page

Communications Act of 1934, 48 Stat. 1064, as amended, 47
U.S.C. 151, et seq:

Section 309	68
Section 311	68
Section 313	76
Section 314	76
Section 326	66, 81

Rules and Regulations of the Federal Communications
Commission, 47 C.F.R. (1973)

Section 73.35	76
Section 73.123	78
Section 73.240	76
Section 73.636	76
Section 73.658(d)	98
Section 73.658(e)	98
Section 73.658(j)(4)	92
Section 73.658(j)(1)(i) and (ii)	4, passim
Section 73.658(k)	2, 3, passim
Section 73.658(k)(2)	80, 42
Section 73.658(k)(3)	6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 74-1168

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

COLUMBIA BROADCASTING SYSTEM, INC.
NATIONAL BROADCASTING COMPANY, INC.
AMERICAN BROADCASTING COMPANIES, INC.
COLUMBIA PICTURES INDUSTRIES, INC.
WARNER BROTHERS CORPORATION
MCA INC.
TIME-LIFE FILMS, INC.
Intervenors.

ON PETITION FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's "Evening Programming Requirements" are reasonably related to the Commission's Congressionally mandated policy objectives in regulation of network television broadcasting?
2. Whether the Commission acted reasonably in amending the Prime Time Access Rule on the basis of the record before it?
3. Whether the "Evening Programming Requirements" are consistent with other existing network regulatory rules of the Commission?

4. Whether the "Evening Programming Requirements" are consistent with the First Amendment; 47 U.S.C. §326; and the licensing scheme of the Communications Act?

5. Whether the severable effective date provisions of the "Evening Programming Requirements" rule is sustainable in light of the reasons given therefor and consistent with the stated objectives of the rule?

STATEMENT OF THE CASE

The petitioner, the National Association of Independent Television Producers and Distributors (NAITPD) seeks review pursuant to 47 U.S.C. §402(a) of a Federal Communications Commission Report and Order (F.C.C. 74-80 released February 6, 1974, 39 Fed. Reg. 5585 (1974)) adopting certain fundamental modifications to the Commission's Prime Time Access Rule (47 C.F.R. §73.658(k)) and redesignating the rule the Evening Programming Requirements Rule. ^{1/}

The Access Rule, designed to limit the amount of network programming broadcast during prime evening time, was one of three closely related rules adopted in May of 1970. ^{2/} the other two of which limited the networks' involvement in syndicating of and their ownership interest in non-network programs and which were designed "essentially to prevent indirect circumvention of the prime time access rule, and to encourage the development of diverse and antagonistic sources of pro-

^{1/} Since both rules are designated as 47 C.F.R. §73.658(k) they will be referred to hereafter, for purposes of clarity, as the Access Rule and the Programming Requirements Rule. The Report and Order, cited to herein by paragraph numbers, appears at page 51 of the Joint Appendix.

^{2/} Report and Order: Network Television Broadcasting, 23 F.C.C. 2d 382, reconsideration granted in part and denied in part, 25 F.C.C. 2d 318, affirmed sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 422 F.2d 470 (2d Cir. 1971). (Hereinafter referred to as Network Television Broadcasting).

gram service. "^{3 /} The Access Rule provided in essential part that after October 1, 1971:

. . . no television station, assigned to any of the top fifty markets in which there are three or more operating commercial television stations, shall broadcast network programs offered by any television network or networks for a total of more than three hours per day between the hours of 7:00 p. m. and 11:00 p. m. local time, except that in the central time zone the relevant period shall be between the hours of 6:00 p. m. and 10:00 p. m. ^{4 /}

. . . the portion of time from which network programming is excluded . . . may not after October 1, 1972 be filled with off-network programs; or-feature films which within two years prior to the date of broadcast have been previously broadcast by a station in the market.

The companion rules, which were known as the Syndication and Financial Interest Rules, and which were not directly put in issue in the present proceeding, essentially barred networks from the business of distributing programs subsequent

^{3 /} Mt. Mansfield Television, Inc. v. F. C. C., 442 F.2d 470, 476 (2d Cir. 1971).

^{4 /} The rule did not apply to non-commercial, educational stations using materials supplied by a non-commercial network, and it exempted from "network programs" special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office.

to their network runs or from participating in the proceeds thereof.^{5 /}

The Syndication Rule became effective on June 1, 1973; the Financial Interest Rule on August 1, 1972.

By Notice of Inquiry and Notice of Proposed Rule Making
^{6 /}
adopted on October 26, 1972 in response to petitions of parties who had originally opposed the Access Rule, seeking revocation or weakening of the Rule, the Commission commenced the proceeding which culminated in the presently challenged

^{5 /} These rules, 47 C. F. R. §73.658(j)(1)(i) and (ii) provide that, with certain minor specified exceptions, the three commercial television networks may not:

"(i) After June 1, 1973, sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as 'syndication' within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States; or reserve any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution; or

"(ii) After August 1, 1972, acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network. . . ."

^{6 /} Notice of Inquiry and Notice of Proposed Rule Making: Operation of and Possible Changes in, the Prime Time Access Rule, 37 F. C. C. 2d 900 (1972). (Hereinafter cited as Notice). This document appears at page 1 of the Joint Appendix; its pagination therein includes both the official pagination cited in this Brief and internal pagination as a Joint Appendix document.

Programming Requirements Rule. "In this proceeding," explained the Notice, "the Commission seeks information as to the effect and operation of Section 73.658(k) of its Rules -- the 'prime time access rule' -- and invites comments on changes in that regulation which may be appropriate for the future." ^{7 /}

The proceeding was needed, continued the Notice:

. . . to gather information about how the rule is working, both as compared to no rule and as compared to how it would work with various changes discussed herein. . . This Commission has some degree of obligation to conduct a continuing examination into the effect of any of its rules; and this is particularly true where, as here, the rule represents a breakthrough into a new area of regulation, previously not subject to rules or restrictions. It is especially true here because of the degree of controversy which surrounded the rule both before and since its adoption. Also, we expressed in our decision in Docket 12782 the belief that the rule should and would be examined from time to time, to see what changes, if any, should be made in it. Therefore some gathering of information is clearly in order. ^{8 /}

The inquiry was also required, said the Commission, to rectify certain operational problems with the Rule in order to ensure that it could "operate in the public interest to the maximum extent". ^{9 /} With

^{7 /} Notice, supra, 37 F. C. C. 2d 900.

^{8 /} Notice, supra, 37 F. C. C. 2d 900, 904-05; see also Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 401.

^{9 /} Notice, supra, 37 F. C. C. 2d 900, 905.

respect to the fact that the rule under review was only weeks old, the Commission explained that allowances would be made for the fact that the Rule's achievements might be less favourable than at a later date and that consideration would also be given to its prospects for future development:

Also, as far as the information gathering may be 'prema-
ture', we recognize that information for the 1972-73 year, which
is what basically will be involved here, may not be as favorable to
the rule as that for some later period, when more of the necessary
adjustments and developments involved have occurred. However,
we believe that, if allowance is made for further developments,
as commenting parties are urged to outline in as much detail as
is now possible, a fairly accurate idea of the rule's prospects
can be obtained at this point. We will make such allowances in
reaching any decision herein.^{10 /}

Before itemizing the areas in which comment was sought, the
Commission stressed the presumptive propriety of the Access Rule as
written and the heavy burden on proponents of rescission or weakening
of its terms:

. . . We make one final point -- although it should be unneces-
sary. The Commission has not adopted any decision or view,
even of a tentative nature, as to the desirability of rescinding
the rule. It would be wholly wrong for us to do so, when the
1972-73 year is just getting under way and there is no data be-
fore us as to the efficacy of the rule under full conditions, i.e.,
with Section 73.658(k)(3) in effect. Indeed, we stress that the

^{10 /} Id. "Moreover," noted the Commission, "apart from the specific
problems in various areas which have arisen, there is a more general
consideration. No 'new rule', such as this one, can be expected to be
100% sound and correct when it is first adopted. After a year's experi-
ence under it, it is appropriate to see how it is working and make those
changes which appear appropriate." Id.

presumption is the other way: the Commission has a rule which is now going into full effect, and there is thus a clear and considerable burden upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest, particularly in light of the purposes set forth in paragraph 2, above. This proceeding gives interested parties an opportunity to make showings on this critical issue, and thus facilitate an informed Commission decision. In light of the petitions and other circumstances, nothing less would be appropriate, but nothing more is to be inferred from what is simply a sound and fair way to proceed to the disposition of significant pending petitions.¹¹ /

The "purposes" referred to in this paragraph were, of course, those set forth by the Commission when it adopted the Access Rule and the companion Syndication and Financial Interest Rules.¹² / The general objective in adopting the rules was "to provide opportunity -- now lacking in television -- for the competitive development of alternate sources

¹¹ / Notice of Inquiry, supra, 37 F. C. C. 2d 900, 906.

¹² / Specifically, paragraph 2 of the Notice quotes the following statement from the Report and Order adopting the Access Rule (Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 395-96): "We believe this modest action will provide a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed affiliated) stations. The entire development of UHF should be benefitted. . . . It may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for this half hour of programming. In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered 'anticompetitive' where the market is being opened through a limitation upon supply by three dominant companies. . . ."

of television programs so that television licensees can exercise something more than a nominal choice in selecting the programs which they present to the television audiences in their communities". ^{13/}

What that programing turned out to be, however, and even whether it turned out to be "quality, high cost" material was not a proper part of the Commission's "objective or intention". Moreover, these matters were not only appropriately but also necessarily a function of the free marketplace itself, from which it would be both the right and the responsibility of the licensee and not the Commission to select the desired programs:

. . . We believe that substantial benefit to the public interest in television broadcast service will flow from opening up evening time so that producers may have the opportunity to develop their full economic and creative potential under better competitive conditions than are now available to them. We emphasize again that it is not our objective or intention to smooth the path for existing syndicators or promote the production of any particular type of program - whether or not it be included within the present category of quality high

^{13/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 397. In this connection the Commission stressed that it was not "carv[ing] out a competition free haven for syndicators" since "under the rules we are adopting no television licensee can be required to carry a syndicated program if he chooses not to do so. He may rely on his own program ingenuity or use locally originated programs to fill out his schedule." However, the Commission also stressed that, "equally the public interest in fostering the feasible maximum of diverse program sources does not permit us to preserve the noncompetitive enclave now occupied in prime time by the television networks." Id.

cost programs. The types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers seeking to sell programs to television broadcasters and advertisers. As his responsibility requires, the licensee will decide which among available sources of programs he will patronize. A principal purpose of our prime time access rule is to make available an hour of top-rated evening time for competition among present and potential nonnetwork program sources seeking the custom and favor of broadcasters and advertisers so that the public interest in diverse broadcast service may be served. 14/

Achievement of the basic objective of creating a healthy independent syndication industry absolutely required provision of "an adequate base of television stations to use its product," explained the Commission, because the nature of the network distribution process gives an inherent and insurmountable competitive edge to the purveyor of network programs:

A healthy syndication industry composed of independent producers capable of producing prime time quality programs must have an adequate base of television stations to use its product. Since the stations in the top 50 markets reach over 75 percent of the available audience, access to these markets is essential to form such a base. The independent stations are not adequate by themselves, in light of the fact that only 14 of these markets have one or more independent VHF stations. The networks obviously have a tremendous and, we

14/ Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 397.

believe, insurmountable advantage in providing programs for their affiliates. Not only is there the natural tendency of an affiliate to do more business with its dominant supplier, but the program distribution process is much simpler via a network. There is a semipermanent affiliation agreement covering almost all programs. The syndicator is forced to make a new contract with each station for each program. Similarly, it is much simpler for an advertiser to make one arrangement for an entire network than to buy station by station. In short, there is no permanent unified distribution machinery. These disadvantages are inherent in the distribution process and not in the product. They must be recognized as realities in the face of the contention that independent program producers can now compete upon an equal basis. The loss of their syndication foothold over the years by the independent producers is difficult to explain on any other basis when we take into consideration the fact that most network programs are actually produced largely by outside producers. We find it difficult to believe that so much of the skill could be concentrated in the three networks. Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 386-87.

Beyond its basic purpose of achieving a healthy syndication industry, the Commission had a number of other closely related objectives in mind in its insistence upon development of new program sources. One of the most important of these was encouragement of programs of less than national appeal, something not only practically, but also theoretically inconsistent with the entire orientation of the national networks toward maximization of the total number of people viewing a particular program. In addition to encouraging such programs, the Commission had what might be termed a negative objective, but one of equal impor-

tance: to avoid the potential ideological tyranny inherent in a situation where networks exercised "control of the creative process in television entertainment programming in the interest of advertiser circulation,"^{15/} with the result that "the three national television networks for all practical purposes control the entire network television program production process from idea through exhibition."^{16/}

"Concomitant benefits" sought by the Commission included "an increased supply of programs for independent (and, indeed, affiliated) stations;" an atmosphere in which independent choice would in fact be exercised by licensees, who "as trustees share the responsibility to maintain healthy competition and should actively encourage the development

^{15/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 391-92.

^{16/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 389. In this connection the Commission appended the following quotation from the 1963 Annual Report of CBS:

[T]he ability to produce a program schedule which year after year commands the largest audiences in broadcasting is founded on a steadfast commitment to two fundamental programming principals. The second is the continuing participation of the network's programming officials at every stage of the creative process from the initial script to the final broadcast. This applies not only to the occasional special program, but to the day-to-day production of continuing program series. 23 F. C. C. 2d 382, 407, footnote 20.

of new and diverse program sources;" ^{17/} benefit to "the entire develop-
ment of UHF;" ^{18/} the possible production of more local programming;
continued network programs for below Top Fifty markets (an objective
defeated prior to issuance of the Commission's Order on Reconsideration,
supra, by the networks' refusal to continue production of a full schedule);
and "the opportunity [for independent producers] to develop their full

^{17/} Order on Reconsideration, supra, 25 F. C. C. 2d 318, 329, footnote 25.
In its text, the Commission went on to explain that:

One principal objective of our Prime Time Access Rule is to lessen the degree of network domination of station operation. The stations in effect are pleading this domination as an element essential to their economic viability. If... affiliates at present are so dependent on national networks that their economic viability and their ability to serve the public interest turn on whether they continue to receive revenues from an additional half-hour of network programming, they clearly are not in a position to exercise the appropriate freedom of choice and the responsibility for television service which are essential to the proper discharge of their broadcast trusteeships. The present degree of network dominance of television... emphasizes the need for Commission action to improve the situation, and to seek to reestablish licensee individuality and responsibility as operable factors in television broadcasting. Order on Reconsideration, supra, 25 F. C. C. 2d 318, 329-30, (footnote omitted).

^{18/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 395, footnote 37. Benefit to local advertisers, forthcoming from either syndicated or local programs, was also noted since "for many years the inability of local businessmen to gain access to prime time television has been a matter of concern," and the Congress had recommended that the Commission act to ensure greater availability of such time. Order on Reconsideration, supra, 25 F. C. C. 2d 318, 325.

economic and creative potential under better competitive conditions. "^{19/}

Finally, although not specifically expressed as a goal, the Commission noted that "it may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for this half hour of programming." What was expressed as a goal in this respect was to "encourage conditions of competition for network evening time and programs which will permit the harnessing of the widest diversity of marketing interests of American business which is economically feasible to the network program selection process."^{20/} While "the history of television programming indicates that this would result in a greater diversity among individual programs," the Commission stressed that "that would be the decision of the marketplace," and "as we have repeatedly emphasized, it is not our intention to set up standards of 'diversity and quality' in television programming." As the Commission further pointed out, such things cannot be achieved by regulatory fiat or the wishes of producers since "in our commercial television system program diversity -- particularly in entertainment -- can be little greater in the long run than sponsors are willing to support."^{21/}

^{19/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 397.

^{20/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 411.

^{21/} Id.

These, then, were the objectives against which the present rule-making was designed to measure the operational record of the Access Rule in its first season. These also were the public interest objectives whose achievement the Commission specified would be conclusively presumed unless proponents of a weakened or rescinded Access Rule successfully carried their "clear and considerable" burden of establishing the contrary.

The information sought concerned "effect and impact - from the operation of the rule as compared to operation without it, and from the various modifications considered herein (and past waiver actions) as compared to the rule. The effect on future development is also highly important."^{22/} The numerous subjects with respect to which information was thereafter sought were "all subsidiary to that general objective" and came within two categories: "programming information and economic information, the latter involving three aspects - the impact on stations, the economics of program production and distribution, and the effect on the program production business."^{23/} There followed several dozen detailed

^{22/} Notice, supra, paragraph 16.

^{23/} Id.

questions, proposals, and subjects within these categories on which information was sought.^{24/}

In addition to these subjects designated for rulemaking, the Notice included a separate section which constituted "an Inquiry only, with changes along these lines to be adopted, if at all, only after further rule-making proceedings," in view of the fact that the matters enquired into were, in the Commission's judgment, "of a more fundamental nature than those" above noted.^{25/} Four matters (two of which included various specified alternatives) were specifically denominated as being of too "fundamental" a nature to permit enactment absent further rulemaking. Of these four matters which would not be adopted as rules, three were adopted as rules: exempting programs by type; legislating local use of access time; and designating a required time period as access time.^{26/} (See pages 22, 23, 24 infra).

Comments and Replies were filed by interested parties in January and March of 1973; oral argument was held on July 30 and 31, 1973. On November 29, 1973 a public notice was issued announcing

^{24/} Notice, supra, 37 F. C. C. 2d 900, 907-921.

^{25/} Notice, supra, 37 F. C. C. 2d 900, 921.

^{26/} Notice, supra, 37 F. C. C. 2d 900, 921-22. The three matters adopted as rules represented retreats from the full scope of the Access Rule. The one matter not adopted as a rule would have strengthened the Access Rule by expanding the access time period and/or the markets or stations covered. Id.

the substantive changes to be made but not designating an effective date.^{27/}
On December 16, 1973, petitioner and the Association of Independent Television Stations jointly filed a petition for clarification requesting designation, by further, immediate Public Notice, of an effective date, to be no earlier than September 1975. Industry confusion resulting from non-specification of a date and irreparable injury to affected parties as a consequence of any date earlier than September 1975 were offered in support thereof. No separate action responsive to this petition was taken. On February 6, 1974, the Commission released its Report and Order, adopting two pages of regulations denominated the Evening Programming Requirements Rule^{28/} and designed to replace the Access Rule quoted at page 3, supra.

The Report and Order adopting these rules summarizes the controlling Commission objectives discussed at pages 7 - 13, supra; devotes some 43 pages to itemizing conflicting contentions of parties; and at page 60 reaches the matter of the Commission's reasons for taking the actions reflected in the rules. The following paragraphs summarize the rules adopted and the reasons given therefor, in the order discussed by the Commission.

^{27/} Public Notice: Commission Issues Staff Instructions in Prime Time Access Proceeding, Mimeo No. 12121, released November 29, 1973. See Joint Appendix, page 47.

^{28/} The full text of the newly adopted Rule 73.658(k) (47 C. F. R. § 73.658(k)) is attached hereto as Appendix A.

The first action discussed by the Commission was its revocation of the Access Rule on Sundays and reduction on the remaining six days to a maximum of one half hour instead of the hour formerly prescribed. In justification of these changes the Commission stated that the 7:00-7:30 p.m. half hour which had in practice been the first half hour of the access period^{29/} offered "singularly little in the way of opportunity for the development of really new syndicated material;" that this had been true before the adoption of the rule and "the basic programming pattern has not changed. . . ;" that the majority of network affiliated stations in the Top Fifty markets present news in this time period and "only about 10% of the stations covered. . . present material which needs the rule's encouragement."^{30/} The Commission stated: "We do not view a contest between stripped game shows and stripped off-network material as one the Commission can profitably get into."^{31/}

^{29/} Presumably because the level of homes using television (HUT level) is lowest during the first hour of prime time, except on Sundays, the networks determined not to program this hour when they decided not to make programs just for below Top Fifty affiliates as the Commission had originally hoped they would. (See page 12, supra). This hour thus, essentially fortuitously, became access time.

^{30/} In this connection the Commission does not comment on the fact that local news was precisely one of the kinds of programming the prime time access rule was designed to encourage. See page 12, supra.

^{31/} Report and Order, supra, paragraph 79.

As additional reasons for its action the Commission cited: (1) the increasing demands for waiver of the rule for news and/or sports presentations and its view that while "these are not insoluble or terribly difficult questions, . . . they would require some careful adjustments . . . and in view of the very little benefit accruing from this period to the cause of promoting really new non-network programming, we conclude that the need for such 'fine tuning' should be dispensed with;"^{32/} (2) the fact that two other newly adopted provisions cut down the licensee's flexibility^{33/} and "it is therefore appropriate to provide stations with some compensating flexibility elsewhere;" and (3) the fact that lessening the amount of access time would "relieve the problems of the 'majors' [i.e. the major motion picture companies who produce the bulk of network programs] and similar parties, by increasing the after-market for former network material."^{34/}

The Commission recognized that the new rules would work to the "disadvantage of independent stations" and that "while probably the advantage which the independents have at present for a full hour is, over-

^{32/} Report and Order, supra, paragraph 80.

^{33/} The two provisions the Commission referred to were the requirements that the remaining access period be 7:30-8:00 p.m. (see pages 22-23, infra), and the prohibition against feature films in this time period. (47 C. F. R. §73.658(k)(1)).

^{34/} Report and Order, supra, paragraph 80.

all, in the public interest. . . . the remaining half hour... is sufficient to satisfy the demands of the public interest."^{35/} The Commission's conclusions are silent as to the impact upon the first run syndicated programming industry.

With respect to the withdrawal of independently syndicated programming from weekends, the entire Commission reasoning is quoted below:

This consideration [presentation of game shows] does not apply particularly to the weekend, but we have concluded that some increase in network programming should be permitted, and Sunday appears a desirable time for this, including the 7 as well as 7:30 half hours, traditionally a popular family entertainment network period. There seems little point in maintaining a restriction only for Saturdays.^{36/}

In summarizing the reasons for its actions, the Commission characterized them as "representing an adjustment of competing demands for access or for exclusive access," with respect to which "we have reached what, at this point, appears an appropriate balance."^{37/} Performance under the Access Rule, in the Commission's judgment, did not warrant its retention as adopted in 1970, "but conversely, particularly since the rule has not yet had an adequate test, neither does its performance warrant either repeal

^{35/} Report and Order, supra, paragraph 81.

^{36/} Report and Order, supra, paragraph 79. The Commission's reference to Saturday appears to reflect its belief that the networks would utilize the 7:30-8:00 p.m. period on Saturdays as part of the exemption permitted under new Section 73.658(k)(1). NBC has already announced its intention to program the Saturday 7-8 p.m. time period in addition to its 8-11 p.m. schedule.

^{37/} Report and Order, supra, paragraph 82.

or a really substantial reduction in cleared time such as to three or four half hours a week". ^{38/}

The second action discussed by the Commission was the provision that one of the six half hours need not be cleared at all if it is filled with "children's specials, documentaries or public affairs programming either network originated or off-network." ^{39/} "Children's specials" and "public affairs" are not defined; ^{40/} with respect to the third exempt category the rules provide:

'Documentary' programming means any program which is nonfictional and educational or informational, but not including programs where the information is used in a contest among participants. ^{41/}

The singling out of these three categories "reflects not so much a view that these kinds of material are 'worthwhile' -- although admit-

^{38/} Report and Order, *supra*, paragraph 82. The Commission also expressed its intention to "preserve considerable potential for the development of first-run syndicated programming"; and its view that the rule has not yet had a fair test upon which to determine what its future performance will be. Report and Order, *supra*, paragraphs 89, 91.

^{39/} 47 C. F. R. § 73.658(k)(1)(i).

^{40/} The text of the Report and Order parenthetically follows designation of the children's specials exemption with the phrase "(Cinderella, The Grinch, Charlie Brown programs, etc.)." Report and Order, *supra*, paragraph 77.

^{41/} 47 C. F. R. § 73.658(k)(1)(ii).

tedly this is a factor -- as that under the present rule its presentation involves certain special problems".^{42/} With respect to children's programs, the Commission said that because of access time the network children's programing could not now begin until 8:00 p.m. and that it was in the public interest to "facilitate the showing of such material earlier, if this is what stations choose to do."^{43/}

The public affairs and documentary provisions would make the presentations of such network programing, which the Commission wishes to encourage, "easier," although the Commission acknowledged that "the rule may well not be the sole, or even the major," cause of the disappearance of this material from prime time. With respect to off-network documentary material, exemption in advance would avoid the necessity of granting waivers for individual programs and create certainty for the independent producers by ensuring that from now on all off-network documentaries would be allowed. The Commission emphasized that the documentary exemptions were not limited to news and public affairs, and that it was intended to encourage the presentation of "other kinds of network or off-network documentaries."^{44/}

^{42/} Report and Order, supra, paragraph 83.

^{43/} Id.

^{44/} Report and Order, supra, paragraphs 83-84, 101.

With respect to the fact that identification of exempt program categories was a matter found in the Notice to be too "fundamental" to be made part of the rules absent a further rulemaking, the Commission stated that since it was "a partial repeal of the rule" and "permissive rather than ^{45/} mandatory [in] nature", the amendment was in the public interest.

The third action taken by the Commission was to require that what remained of access time be inflexibly tied to the 7:30-8:00 p.m. E. T. time period. This provision was adopted, although no commenting party had requested or supported it, because in the Commission's view ^{46/} it would serve the "interest of certainty and stability" for networks, stations and independent producers and would not require access programming to ^{47/} compete with network programming.

^{45/} Report and Order, supra, paragraph 84, footnote 36.

^{46/} Report and Order, supra, paragraph 85.

^{47/} No such problem has ever either arisen or been contemplated as a potential danger by the Commission or anyone else since it became clear at the time of reconsideration of the original Access Rule Report and Order that the networks would defeat the Commission's hope for a continuing full network schedule available to below Top Fifty affiliates and perhaps even non-affiliates. While in that case each station would have made its own decision as to which available network material to reject during one evening hour, the availability of only a total of three hours obviated the "problem." See Order on Reconsideration, supra, 25 F. C. C. 2d 318, 327. The Report and Order does not mention this fact.

The Commission did not comment on the fact that legislation of a fixed access period had been held in the Notice to be of too "fundamental" a nature to be adopted absent further rulemaking. Nor did it comment on the fact that the only reason it had given for suggesting this change in the Inquiry portion of the Notice had been to prevent the access period from being limited to the 7:00-8:00 p.m. time period.^{48/}

The fourth action taken by the Commission was to bar all feature films^{49/} from the 7:30-8:00 p.m. time period Monday - Saturday. Such limitation, the Commission concluded, is necessary if the production of new non-network material is to be encouraged during the remaining cleared access time.^{50/} Moreover, coupled with the removal of all restrictions from 7:00-7:30 p.m., said the Commission, licensees will not be unduly restricted and the use of the time period for movies has been minimal in the past.^{51/}

The fifth action taken by the Commission was not codified in rule form but expressed as an admonitory textual "expectation" that "stations subject to the rule will devote an appropriate portion of this 'cleared' time, or at least of total prime time, to material designed for children,

^{48/} Notice, supra, 37 F.C.C. 2d 900, 921-22.

^{49/} Feature films shown in the same market in the last two years were barred by the original rule.

^{50/} Report and Order, supra, paragraph 86.

^{51/} Report and Order, supra, paragraph 87.

material which is of particular significance with respect to interests, problems, and affairs of minority groups, and/or material particularly directed to the needs and problems of the station's community or coverage area as disclosed in its regular efforts to ascertain community needs".^{52/}

The sixth action taken by the Commission was to designate a list of network programs which by virtue of their nature and/or scheduling and/or length are henceforth to be deemed non-network programs and therefore eligible for broadcast in access time without prohibition or compensatory non-network material elsewhere in the schedule.^{53/} Programs exempt from the rule include runovers of network sports events which would "in the normal course" have ended by 7:00 p. m.;^{54/} any "live, simultaneous" network broadcast to the 48 contiguous states which occupies access time in the Pacific and Mountain time zones but not in the Eastern and Central time zones, (an exemption which the Commission estimates would, in the context of special sporting events alone, mean that for half the nation during half the year there would be no access time on one of the remaining

^{52/} Report and Order, supra, paragraph 88. No reference is made to the existing licensing requirements that all programs be demonstrably directed to the needs and problems of the station's coverage area. Henry v. F. C. C., 302 F.2d 191 (D. C. Cir. 1962), cert. denied, 371 U.S. 821. Nor is reference made to the fact that this was one of the proposals too "fundamental" for change absent further rulemaking.

^{53/} Because of the enforced clearance of 7:30-8:00 p.m. only, there is in fact no provision at all in these rules for the kind of compensatory rescheduling permitted and in most cases required under the Access Rule.

^{54/} 47 C. F. R. § 73.658(k)(2)(i); Report and Order, supra, paragraph 107.

nights on which it is otherwise required);^{55/} network specials (except for movies and sports events -- unless they are "international"), which occupy all or most of the evening after 8:00 p.m. as well as all of access time;^{56/} network "pre-game" shows preceding sports events on five nights per network per season;^{57/} and "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or programing related to such events, and political broadcasts by or on behalf of legally qualified candidates for public office."^{58/}

^{55/} 47 C. F. R. § 73.658(k)(2)(ii). In explaining this exemption the Commission conceded that the problem with which it dealt was the direct result only of its own concurrent requirement that access time be inflexibly fixed at 7:30 p.m. and said that for that reason affected stations should be wholly relieved of their access obligations since the problem was "too complex". Report and Order, supra, paragraphs 108-109.

^{56/} 47 C. F. R. § 73.658(k)(2)(iii); Report and Order, supra, paragraph 110.

^{57/} 47 C. F. R. § 73.658(k)(2)(iv); Report and Order, supra, paragraph 111. The only reason given for this exemption was that waivers had been sought. The choice of five was apparently keyed to what NBC said it wanted "plus one other event". Id.

^{58/} 47 C. F. R. § 73.658(k)(2)(v); Report and Order, supra, paragraphs 101-105. This provision includes three very specific exemptions also in the present Rule plus a new general exemption for any program "related to" two of the exempt events which could wholly replace all access time every day with special background reports by the networks on that day's fast-breaking events. The Commission's discussion of this new exemption is limited to its utility in clarifying the kinds of additional material otherwise arguably impermissible in the context of an "on the spot" coverage (e.g. old film clips). The Commission does not discuss the fact that the exemption, as written, creates a third and additional category of program whose broadcast neither the rule nor the explanatory text prohibits.

After setting forth the reasons for the modifications adopted, the Commission devoted several pages of its decision to "discussion of significant arguments" and made the following conclusions:

The Rule has not been in full operation long enough to have had a fair test;59/

While it is too soon to look "too closely" at the programming presented under the Rule, increase in program "stripping", foreign produced program product and game shows and decrease in dramatic programs are unfavourable results of the Rule and an increase in comedy programs, local program efforts and nature/outdoor programs are positive results of the Rule;60/

"Since it is too early to evaluate the full potential of the rule", it will not be decided whether the Rule has increased the number of producers represented during the access time period;61/

Repeal of the Rule would not necessarily result in greater network access for producers since the networks could just add to the length of existing movies or other programs rather than increasing the number of programs;62/

The Rule has decreased network dominance -- "the reduction in control through removing 11 or 12 hours a week from the 'network funnel' is definite and readily apparent;" 63/

59/ Report and Order, supra, paragraphs 89-91.

60/ Report and Order, supra, paragraphs 92-94.

61/ Report and Order, supra, paragraph 95.

62/ Report and Order, supra, paragraph 96.

63/ Report and Order, supra, paragraph 97. The Commission's reference to "11 or 12" hours is unclear and unexplained. The Rule removes 7 hours per week per station or 21 per market from the "network funnel;" it is uncertain, therefore, whether the Commission means more access material than the legal minimum or less is being used.

The questions of the Rule's "impact on Hollywood" and the use of foreign produced program product will not be considered for seven reasons, including the fact that they are "outside the normal ambit of the Commission's expertise" and beyond the scope of its jurisdiction;^{64/}

The questions of "commercialization" (i.e. the fact that local station time includes in many cases more commercial time than network time) and increased access to non-national advertisers (an objective of the rule) are "conflicting but difficult to weigh because they are quite different" and "about equal pro and con". ^{65/}

Finally the Commission adopted a fall 1974 effective date for the Programming Requirements Rule "to lessen the restraint [of the Access Rule] at the earliest date consistent with the need for reasonable advance planning." Since the changes in the rule adopted were "basically not great," "sufficient time would be afforded". ^{66/}

From that Report and Order the present petition for review is brought. ^{67/}

^{64/} Report and Order, supra, paragraphs 98-99.

^{65/} Report and Order, supra, paragraph 100.

^{66/} Report and Order, supra, paragraphs 113-116.

^{67/} At the time of this filing reconsideration before the Commission has not been completed.

I. THE EVENING PROGRAMMING REQUIREMENTS RULE BEARS NO RATIONAL RELATIONSHIP TO THE COMMISSION'S REGULATORY OBJECTIVES.

A. Nothing In The Present Record, The Report And Order Or The Commission's Experience Renders The Programming Requirements Rule A Rational Solution To The Problem Of Network Dominance.

The Prime Time Access Rule was necessitated by the fact that "the three networks not only in large measure determine what the American people may see and hear during the hours when most Americans view television but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs." Mt. Mansfield Television, Inc. v. F. C. C., supra, 442 F.2d 470, 474.^{68/} To deal with this situation, "the Commission proposed certain rules designed 'to foster free competition in television program markets' by providing 'opportunity for entry of more competitive elements into the market for television programs for network exhibition' and encouraging 'the growth of alternative sources of television programs for both network and non-network exhibition.'" Id. "The purpose and effect" of adopting the Access Rule and its corollary ban on the "use of off-network shows (re-runs) and feature film" during non-network prime time was to limit network control and increase the "opportunity for development of truly independent sources of prime time programming," which "existing practices and structure combined" have "virtually eliminated." Mt. Mansfield Television, Inc. v. F. C. C., supra, 442 F.2d 470, 475.

In short, the Rule and its two companion regulations, The Syndication and Financial Interest Rules, were designed to replace monopoly with effective competition, itself a function so basic as to have led to initial creation of the Commission,^{69/} in the interest of enforcing the paramount

^{68/} In this and the several following references containing internal quotations the Court is quoting from Network Television Broadcasting, supra.

^{69/} F. C. C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137; Mt. Mansfield Television, Inc. v. F. C. C., supra, 442 F.2d 470, 479; 47 U.S.C. §§303, 303(g).

right of the public to "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v. United States, 326 U.S. 1, 20 (1945), Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969); Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477. It is, in the view of the Commission and this Court, "a reasonable step toward fulfillment of [the First Amendment's] fundamental precepts, for it is the stated purpose of that rule to encourage the 'diversity of programs and development of diverse and antagonistic sources of program service' and to correct a situation where 'only three organizations control access to the crucial prime time evening television schedule.'" Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477.

In designating the present proceeding, the Commission sought to ensure that the Access Rule in actual operation was achieving this intended objective and to the extent, if any, that it was not, to adopt appropriate remedial modifications -- including revocation in the event of total failure. This was consistent both with the Report and Order adopting the Rule ^{70/} and the Commission's basic mandate "to make re-examinations and adjustments in the light of experience." American Airlines v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966). However, because the Access Rule remained the Commission's best judgment of the proper way to deal with the problems it was designed to solve, the present proceeding started from the "presumption" that this judgment remained correct. Notice, supra, paragraph 15.

Thus, while the Commission made clear that if the Rule's opponents had "a showing to make based in significant measure on actual relevant experience" under the Rule, "they will have a remedy available to vindicate

^{70/} Report and Order, supra, 23 F.C.C. 2d 382, 401.

their asserted rights," ^{71/} it also stressed that in view of the presumptive propriety of the action already taken in adopting the rule they must carry "a clear and considerable burden... to demonstrate that, in actual operation, the rule will not serve the public interest." Notice, supra, 37 F.C.C. 2d 900, 906.

The two dozen odd charges leveled against the Rule in actual operation were summarized by the Commission in its Report and Order, supra, at paragraphs 32 - 48. To the extent that these charges were specifically answered, ^{72/} all were rejected as unsupported by the record; affirmatively contradicted by the record; outside the scope of the Commission's expertise; or beyond the scope of its jurisdiction. For one or more of these reasons the Commission rejected charges that: the programming record under the Rule was unsatisfactory; ^{73/} the number of producers represented in access time had diminished under the Rule; ^{74/} by reducing the amount of network prime time, the Rule had also reduced the amount of time available for

^{71/} American Airlines v. CAB, supra, 359 F.2d 624, 634.

^{72/} Many of the charges were not specifically answered because they were cumulative in the sense that multiple specific allegations were asserted in support of one general attack on the Rule which was answered (for example arguments 7, 10 and 13 in paragraph 32, were all advanced in support of the overall charge that the Rule had increased network dominance). All other charges which were not discussed in the Report and Order amounted to nothing more than repetition, on the same factual basis, of arguments rejected in the original Report and Order (for example, the charge that the Rule was unconstitutional -- paragraph 32, argument 1; the charge that the Rule was encouraging barter sale of programs -- paragraph 32, argument 12 -- which the original Report and Order had anticipated as one of the procedures by which the Rule would operate to defeat network dominance. See e.g., Network Television Broadcasting, supra, 23 F.C.C. 382, 390-91; Order on Reconsideration, supra, 25 F.C.C. 2d 318, 326.

^{73/} Reasons for rejection of this argument included its prematurity after only one year; the fact that adverse programming consequences were counter-balanced by favourable ones; and the fact that the judgments called for in this area would to a great extent involve improper examination of program content. Report and Order, supra, paragraphs 92-94.

^{74/} Report and Order, supra, paragraph 95: "In view of our basic conclusion above that it is too early to evaluate the full potential of the rule, we need not at this point get into this question."

"significant new programs;" ^{75/} only networks had the "resources" or the "fortitude" to do different or controversial programing and continue it in the face of unpopularity; ^{76/} the Rule had increased network dominance by strengthening network control over remaining prime time vis-a-vis advertisers and program suppliers; ^{77/} the Rule was detrimental to Hollywood film production and employment and resulted in increased use of foreign produced material; ^{78/} and the Rule had caused increased commercialization by licensees. ^{79/}

Having thus specifically rejected every argument advanced in support of revocation or weakening of the Access Rule, the Commission additionally concluded that the proceeding had affirmatively established that it was in fact too soon to reevaluate the Rule. ^{80/} In short, the rule's "opponents" had failed to carry their "clear and considerable burden. . . to demonstrate that, in actual operation, the rule will not serve the public interest," ^{81/}

^{75/} Nothing in the record demonstrated that more time would be so used, said the Commission, and in fact, history suggested quite the contrary. Report and Order, supra, paragraph 96.

^{76/} This contention was wholly speculative. Report and Order, supra, paragraph 96, footnote 41.

^{77/} This charge was found to be speculative and, in any event, outweighed by the decrease in dominance through removal of access time programing from the network funnel, a result both "definite and readily apparent." Report and Order, supra, paragraph 97.

^{78/} This argument was rejected for all four of the reasons listed above. Report and Order, supra, paragraphs 98-99.

^{79/} The Commission essentially declined to credit this contention because to the extent that it was correct it was counterbalanced by the record demonstration of increased access for local and regional advertisers, an affirmative goal of the Rule. Report and Order, supra, paragraph 100.

^{80/} Report and Order, supra, paragraphs 89-91. This conclusion was also noted in specific contexts at paragraphs 92, 94, 95, and 98.

^{81/} Notice, supra, paragraph 15.

thus leaving the "presumption" of propriety in effect. Furthermore, the timing of the proceeding, in relation to the infancy of the Rule, was held to be such as to leave the Commission itself without sufficient data to justify any alteration of that original presumption of propriety, which accordingly remained the controlling public interest finding. The record here made against the Rule thus amounted to nothing more than had unsuccessfully been urged at length before the Commission and this Court in 1970 and 1971 where it had been concluded that "the horrors charged rest on conclusions and not facts." Radio Relay Corp. v. F.C.C., 409 F.2d 322, 330 (2d Cir. 1969).

Thus, with the exception of any "housekeeping" details designed to expedite the existing Rule's achievement of its reaffirmed objectives,^{82/} the net effect of the Commission's investigation, on the basis of either the evidence of parties or the Commission's own knowledge, was to leave intact the judgments underlying the Access Rule and therefore that Rule itself, subject, of course, to the continuing power and duty of the Commission to monitor and reevaluate the Rule's performance.

That is not, however, what the Commission did. Faced with its own conclusive presumption of propriety, plus its own specific judgment that changes were premature, plus the unnecessary but admittedly present record indicants of achievement of decreased network dominance, a strengthened independent syndication industry, increased licensee independence, benefits to independent and UHF stations (whom the Commission's records showed to have profited for the first time in history under the Rule), and increased access for local advertisers, the Commission adopted rules which amounted to virtual revocation of the Access Rule. The minimum impact of the changes adopted was to reduce access

^{82/} In this connection, see Argument IB, infra.

for non-network programs from 7 hours per week to 6 half hours; the cumulative operation of multiple exemptions could, theoretically, erode every single remaining half hour and was actually intended to erode at least one and probably more. Nor, while it referred from time to time to the minor nature of its changes, was the Commission unaware that substantial repeal of the Rule was in fact what its modifications achieved. Indeed, this point was conceded, to a limited extent, in an ironical context when the Commission justified its enactment of exemptions the Notice had promised would come only after a further proceeding, if at all, by characterizing them as "a partial repeal" of the Rule. ^{83/}

Since it remains the Commission's unassailably correct judgment that any regulation which permits the use of prime time for network or off-network material in fact ensures the use of prime time for such material, it also follows necessarily that the extent to which the Programming Requirements Rule diminishes the time reserved exclusively and unconditionally for non-network programs represents also the extent to which the Commission has reestablished the prime time monopoly the Access Rule was intended to destroy.

By challenging its action in thus reestablishing the 3 network funnel found by the Commission and this Court to do violence both to the fundamental mandate of the Communications Act to encourage the wider and more effective use of radio and the First Amendment right of the public to receive access to other than network programs, petitioner does not deny the Commission's fundamental right to take such an action. Rather, petitioner contends that to take such an action on this record was irrational, unexplained and inexplicable.

^{83/} Report and Order, supra, paragraph 84, footnote 36.

It is manifestly within the Commission's power to reject the objectives of open competition and public access to diverse program sources which underlie the Access Rule and therefore to revoke or, as here, substantially revoke that Rule despite its admittedly successful achievement of those objectives. In doing so, however, the Commission would necessarily have to demonstrate either: (1) that open competition and diverse program sources disserve the public interest -- and demonstrate this in the face of the Constitution and the Communications Act which the Commission and the Courts have hitherto interpreted quite otherwise, as was made clear in the Mt. Mansfield case, supra; or (2) that these objectives must, under the circumstances, be overlooked because they are of subordinate importance to other and overriding public interest objectives, as, for example, was held to be the case with this very rule to the extent that the free speech rights of licensees, networks and major studios are restrained to protect the paramount right of the public. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 478. Needless to say, the Commission could also have demonstrated how the ends of competition and diversity could better have been served through its altered regulatory system, assuming those controlling objectives continued to be found, as in fact of course they were, to be in the public interest. ^{84/} In doing so, however, the Commission must explain how "alter[ation of] its past interpretation" or "overturn[ing of its] past administrative rulings and practice" is justified by virtue of "new developments or in light of reconsideration of the relevant facts and its mandate", ^{35/} particularly where, as here, that past interpretation and those past rulings have also been found reasonable by this Court.

^{84/} Indeed, its discretion to choose its own measures in this area has often been held to be particularly broad in view of the importance of the controlling objective of discouraging concentration of control in all aspects of broadcasting. See Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 860 (D.C. Cir.1970), cert. denied, 402 U.S. 1007 (1971); Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966).

^{85/} American Trucking v. A.T.&S.F. Ry. Co., 387 U.S. 397, 416 (1967).

The fact is, however, that the Report and Order neither did, nor even attempted to do, any of these things, leaving absolutely no foundation on which this Court could make the requisite finding that the challenged regulations were a reasonable and lawful exercise of authority. National Broadcasting Co. v. United States, 319 U.S. 190, 224-25 (1943); WAIT Radio v. F.C.C., 418 F.2d 1153, 1156 (D.C. Cir. 1969). Unless the Court is given a record which permits it to "consider the strands of public interest identified by the Commission," it is manifestly impossible for the Court "to determine whether the Agency's delineation is contrary to law." WAIT Radio v. F.C.C., 459 F.2d 1203, 1207, cert. denied, 409 U.S. 1027 (1972); Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850.

As previously noted, every regulation here at issue is effective only because and to the extent that it withdraws time from the non-network program sources the Rule was designed to encourage and returns it to the very network and off-network program sources the Rule was designed to discourage. Necessarily, then, the absence of public interest findings with respect to abandonment of the goals of competition and diversity must be held fatal to these rules. Moreover, as will appear in following arguments, to the extent that any other public interest findings were made in justification of the new rules on their own merits, those findings invariably either: failed to explain why the objectives of the new rules overrode the Access Rule objectives which they destroyed; or were on their face illegal and therefore impermissible without regard to their effects on the goals of competition and diversity. The Commission's right to change its policies to meet changed circumstances is broad indeed, but the changes it may permissibly make are bounded by "the limits of the law and of fair and prudent administration." American Trucking v. A.T.&S.F. Ry. Co., supra, 387 U.S. 397, 416. The present action exceeds those bounds.

B. The Intent And Effect Of The Programming Requirements Rule Is To Increase Network Dominance.

While specifically characterized as minor modifications to an existing rule designed to decrease the network prime time presence, each of the challenged Evening Programming Requirements was expressly adopted solely or principally because it would permit an increase in the network prime time presence.

In the Notice instituting this proceeding, the Commission noted a number of areas in which it proposed to review the operation of the Rule. The first of these categories encompassed a number of specific and relatively minor operational difficulties which had arisen in the operation of the Rule, including time zone problems and sports runovers. The second category was that of the continuing pressure for ad hoc waivers of the Rule and its off-network corollary. In this connection, the Commission expressly invited comment as to whether exemptions would solve the administrative problems it faced, whether that solution would be worse than the problems, and whether the problems could be solved in some other fashion. The third category of change on which comment was sought was the complete or partial rescission of the Rule. In this regard the Commission expressly stated that the Rule as written was presumptively in the public interest and proponents of revocation would have to carry their "clear and considerable burden" to precipitate any Commission retreat from full enforcement thereof. Finally, the fourth category on which comment was invited was "fundamental" changes in the Rule which the Commission said would not be undertaken without further rulemaking proceedings. Included in this last category were the questions of legislating a specific access time, providing exemptions for certain programs by type, legislating local use of access time and expanding access time and/or markets or stations covered by the Rule.

In the face of its conclusions that the Rule had not yet been in effect long enough to evaluate its potential performance and that it had suffered from a psychologically adverse infancy, the Commission adopted modifica-

tions in every category designated in the Notice. The result of these changes was to permit network or off-network reentry into at least 65% and potentially 100% of the access period.^{86/} This dismantling of access time was accomplished through a series of modifications of and exemptions from the Rule.

The single most basic and costly action was the unconditional revocation of the first half of the access hour. Two of the five reasons given for this action reflected the Commission's intention to increase network prime time presence. The first was that the revocation was warranted because the networks were requesting waiver to increase their news and news related programing and the second was to "relieve the problems of the 'majors' and similar parties by increasing the after market for former network material" (reruns).^{87/} The Commission did not explain how its second network-related reason could be reached in light of the fact that at paragraph 98 of the Report and Order, the Commission also held that the problems of the "majors" were beyond the ambit of its expertise or jurisdiction and that this record contained inadequate information upon which to determine whether relief should or could be afforded the "majors". Nor did the Commission seek to explain how either of these reasons comported with the objective of the Access Rule to diminish network prime time presence. Indeed, the Commission clearly anticipated the reintroduction of network and off-network material in this previously restricted time period with no compensating diminution of network presence in the

^{86/} Incredibly, the Commission (Report and Order, supra, paragraph 82) held that "particularly since the rule has not yet had an adequate test, its performance [does not] warrant either repeal or a really substantial reduction in cleared time such as to three or four half hours a week."

^{87/} Report and Order, supra, paragraph 80.

remainder of prime time. ^{88/}

The second action resulting in withdrawal of one of the seven remaining half hours of access time was the revocation of the Rule on Sundays. This action was taken for the sole purpose of giving the entire Sunday prime time period back to the networks. The only justification offered by the Commission is that Sunday is traditionally a network family entertainment evening (Report and Order, supra, paragraph 79). However, this tradition also existed in 1970 when the Commission adopted the Access Rule for the express purpose of reducing network presence in prime time. In fact, prior to the adoption of the Rule, network presence in all of prime time was a tradition which the Commission found inimical to the public interest precisely because it was so well and thoroughly established.

The third action resulting in withdrawal of one of the six remaining half-hour access slots was provision for a weekly exemption allowing presentation of network or off-network "children's specials," public affairs

^{88/} The remaining three reasons for revoking half the Rule (Report and Order, supra, paragraph 80) were either elsewhere expressly contradicted by the Commission or are matters which the Commission may not consider -- i.e.: (1) Only 10% of the stations covered present material needing the Rule's encouragement. (The Commission's own figures (paragraph 79) demonstrate that 136 of the 139 stations considered present first run syndicated programming or local or network news in the 7-7:30 p.m. time period. The first two program types were derived from the non-network sources the Access Rule was designed to encourage and the network news is presented at 7 p.m. under a waiver only when the station has presented one hour of local news previously); (2) Some stations are presenting stripped game shows in the 7-7:30 p.m. time period. (Aside from the fact that the Commission disclaimed an intention to look "too closely" at the program performance under the Rule at this early stage (paragraph 92), the shows in question are first run syndicated material which the Rule was designed to encourage and the Commission is in any event precluded by the Act and the Constitution from imposing its program judgment on the individual licensee. See Argument II, infra); and (3) Other amendments adopted in this Report and Order diminish licensee flexibility and partial revocation of access time will provide "compensating flexibility". (To the extent unrequested flexibility is required, it is required only because of the concurrent and unwarranted Commission legislation of a fixed access period).

programs and documentaries.^{89/} This entire exemption was framed solely to induce networks to increase the very network prime time program offerings the Access Rule was designed to reduce.

In the case of "children's specials," the Commission erroneously reasoned that the exemption was warranted because the Rule had precluded early prime time programming of this nature. (Report and Order, supra, paragraph 83). In fact, the Rule was irrelevant to the situation the Commission sought to remedy. Nothing in its provisions required placement of access time from 7:00 - 8:00 p.m.; this was solely a decision made by the networks, as the Commission was well aware. In fact, in the inquiry portion of the Notice, the Commission sought to explore the possibility of legislating placement of access time at a later hour to prevent the networks from limiting independent producers and distributors to the least lucrative portion of prime time. (Notice, supra, 37 F. C. C. 2d 900, 921, 923-24).

By adopting the "children's special" exemption, the Commission returned one half hour per week to the networks because by their own action and decision they had rejected the time period, preferring to present three hours of programming from 8:00-11:00 p.m. when the audience levels are higher. If such a decision on the part of the networks was irrevocable, the Commission's public interest responsibilities may have dictated that they acquiesce to this network "blackmail," but that was not the case. At any time the networks could have offered children's or any other programming throughout prime time. The licensee could then have chosen

^{89/} The failure of the Commission to provide a usable standard for identifying the three program categories exempted and the impropriety of this regulatory expression of program preferences are discussed at Argument II D, infra, and constitute separate and sufficient grounds for reversal. In addition, as this record reflects, the prime time period referred to, 7:00 - 11:00 p.m., is adult prime time; children's prime time is generally considered to be 4:30 - 5:30 p.m.

to offer non-network programing at any prime time hour he thought best served his public. This licensee freedom to choose from an abundance of network offerings was the scheme the Commission had envisioned in adopting the Rule. (Network Television Broadcasting, *supra*, 23 F.C.C. 2d 382, 395). ^{90/} The "children's special" exemption is merely a device whereby the dominant network entities are permitted to preempt non-network prime time to present material that they decline to present in network prime time. On its face, such an exemption is destructive of the Access Rule and provides no public benefit that could not be afforded without such destructive effect. ^{91/}

The public affairs and documentary programs subject to this same exemption represent still another Commission invitation to the reintroduction of network and used network material at the expense of access time. Here again, the Commission had found that the problem identified, the alleged diminution of this type of programing during prime time, was not traceable to the Rule. Indeed, the Commission expressly stated that the Rule was not the "sole, or even a major cause" of such diminution (Report and Order, *supra*, paragraph 84). The Commission's expressed intention in affording this exemption was to make access time

^{90/} While the networks had frustrated this vision by announcing prior to Commission reconsideration that they would limit themselves to three prime time hours of programing, they remain free to expand their program offerings. In fact, nothing would prevent networks from selling their excess programing in a given market to independent stations and thus furthering the Commission's public interest objective of increasing the pool of programing available to the public, as the Commission also noted in the cited paragraph.

^{91/} Insofar as the exemption is also available to off-network (rerun) material, a further undermining of the Rule results from the fact that new material, from whatever source, has been found unable to compete with used material. Network Television Broadcasting, *supra*, 23 F.C.C. 2d 382, 395; Report and Order, *supra*, paragraph 106. Moreover, given this inability to compete, the exemption assures the future non-production of children's programs by independent sources.

presentation of network and off-network programs in this favoured program category "easier." ^{92/} At no time did the Commission determine that the public interest in increased public affairs and documentary programming could not be met through non-network sources ^{93/} or, if it could not, that the public interest in such network programming was of a higher priority than the Access Rule's public interest objective of stimulating production of this and all other kinds of programming from diverse and antagonistic sources.

The fourth action intended to return a substantial portion of the five remaining weekly access half hours to the networks was the Commission's determination that stations in the Mountain and Pacific time zones would be exempt from the Rule whenever a network special event (most frequently sports) preempted the legislated access time period. Thus, far from solving what had been cited in the Notice as a minor administrative problem, the Commission unilaterally transmuted an error of detail in the Access Rule into substantial revocation of the Rule for one-half the country for one-half the year by its own minimum estimate. The regulation adopted provides that on any evening when a network simultaneously telecasts an event which runs through the local access period in the Mountain and Pacific time zones (6:30 M. T. and 7:30 P. T.), that network program will be deemed to be non-network (§73.658(k)(2)(ii)) and thus access time need not be afforded by the affected stations. ^{94/}

^{92/} Report and Order, supra, paragraph 84. The Commission also reasoned that this exemption would remove the uncertainty caused independent producers by its present practice of granting waivers. Insofar as this was to be a benefit to independent producers, it clearly worsened the situation by wholly denying them access.

^{93/} In view of the Commission's determination that it is too soon to assess the Rule's program stimulating potential, such a determination at this time would have been impossible. (Report and Order, supra, paragraphs 92-94).

^{94/} The Commission estimated that sports events alone would account for almost 50% of one weekly access half-hour, but since the exemption is not limited to sports events, the further effect of this exemption is potentially to eradicate the access period completely. Report and Order, supra, paragraph 108.

The Commission, in its haste to return access time to the networks, did not explain why the present procedure of requiring stations to present non-network programming after the conclusion of the network event would not continue to serve the public interest. The problem, which is totally of the Commission's own making, is "solved" by further eroding the meagre prime time base for non-network programming which the Commission purportedly continues to find in the public interest.

Finally, in order to permit the return of the remainder of the somewhat less than 5 half hours of weekly access periods to the networks, the Commission adopted a series of definitions which simply provide that numerous network programs will not be considered network programs for purposes of the Rule.^{95/} Those further exemptions make it entirely possible that no prime time access period will, in practice, remain. Thus, if a network presents any program which is: "an international sports event" or "any other network programming of a 'special' nature other than sports events or motion pictures, when the network devotes all of its time after 8 p.m. E.T. or P.T." thereto or "a pre-game show in connection with an important sports event carried by the networks" (limited to 5 times per broadcast year) or a special news program dealing with fast breaking or on the spot news coverage or programming related to such events or a political broadcast by or on behalf of a legally qualified candidate,^{96/} then all affected stations are relieved of the obligation to present prime time non-network programming for

^{95/} See Carroll, Lewis, Alice in Wonderland and Section 73.658(k)(2).

^{96/} With respect to this last network program that is not a network program, the Commission has expanded a prior unchallenged exemption for fast breaking news events or on-the-spot news coverage to include any programming relating thereto regardless of its age or urgency. Theoretically, a network could institute a daily program "relating to the day's chosen news story," thus defeating the Access Rule completely.

that evening. In adopting these further exemptions, the Commission based its action solely upon its unsupported judgment that it is more important to encourage the presentation of the enumerated material than to achieve the objectives of the Rule. Moreover, as with every other exemption, the Commission made no finding either that the program categories singled out for favoured treatment were unavailable from non-network sources or that such sources could not be encouraged to develop by full adherence to the objectives of the Rule. Indeed, the Commission could not have so concluded in view of its own frequent finding that since the Rule is "just going into effect," it is simply too early to evaluate its ultimate or potential performance. See, e.g., Report and Order, supra, paragraphs 89-91, 92, 94, 95, 98.

In addition to virtually complete revocation of the Rule through fiat and exemption, the Commission's further action requiring that any remaining access time be afforded at 7:30 - 8:00 p.m. E. T. and P. T. (6:30 - 7:00 p.m. M. T.^{97/} and C. T.), assures that the access time remaining will be available only in the least valuable portion of prime time (See Notice, supra, 37 F. C. C. 2d 900, 923). This action, which was not urged by any party to the proceeding, was offered as solving several problems.^{98/} However, to the extent that these problems even exist in the first place they are wholly engendered by other changes made in the same Report and Order. Moreover, the value of their solution would in any event be outweighed by the detriment of assured network domination of the substantially more lucrative prime time hours on network affiliated stations.

^{97/} Without comment, the Commission has changed prime time in the Mountain time zone from 7:00-11:00 p.m. to 6:00-10:00 p.m. It is impossible to determine on the basis of the Commission's silence whether this represented a reasonable action or merely a device to permit further encroachment on the Access Rule.

^{98/} See Report and Order, supra, paragraph 85.

Each of the major modifications of the Rule which make up the Evening Programming Requirements itself represents an intentional increase in network dominance at the expense of the time previously allocated for and restricted to non-network programing. While each of these modifications discussed above is inappropriate for the reasons given here and elsewhere in this Brief, the matter of the cumulative impact of all the changes is equally important. The Commission itself originally "realized that the various changes, [proposed relaxations of the rule] if made in the different areas, might have a cumulative impact on the availability of prime time to non-network sources, even though the impact from some of them individually might not be significant." (Notice, supra, 37 F. C. C. 2d 900, 921.

In the event, however, this matter never was considered, despite the fact that the various parts of any viable form of access rule must necessarily function as parts of a "compact bundle or pattern" whose "joint impact" is itself significant. National Broadcasting Co. v. United States, 319 U. S. 190, 197 (1943). This failure of analysis resulted in a Report and Order which amounted to no more than an impermissible "excursion into detail" that "obscures the fundamental issues". WBEN, Inc. v. F. C. C., 396 F. 2d 601, 618 (2d Cir. 1968), cert. denied, 393 U. S. 914. The Commission's actions, which intentionally returned 57-100% of access time to network dominance, were never examined in light of the controlling public interest in limitation of network control of prime time programing by increasing the opportunity for development of truly independent sources of such programing. Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 394. The Commission did not explain how a healthy first run syndication industry which had been held by this same Commission^{99/} to require certain access to a daily one hour of prime time on every network affiliate in the top 50 television markets could be expected to survive on less than one half that availability.

^{99/} Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 386-87, 392, 394.

Petitioner is not asking this Court to substitute its judgment for that of the Commission, but rather to determine whether the Commission's challenged actions were based on the required reasoned judgments in light of the statutory and Congressional mandate these rules were designed to effectuate. As the Supreme Court has said, the courts "'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" NLRB v. Brown, 380 U.S. 278, 291. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. . . .' American Ship Building Co. v. NLRB, 380 U.S. 300, 318." Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968). Nor need this Court be deterred by the apparent complexity of the matters involved. As another Court has noted in discussing the proper scope of review in connection with another F.C.C. action, "expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to 'become a monster which rules with no practical limits on its discretion:'" Burlington Truck Lines v. U.S., 371 U.S. 156, 167 (1962). " Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850. Judge Leventhal continued on the same subject:

. . . A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.
Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850 (footnote omitted).

Performance of that function on this record mandates reversal.

C. The Commission's Failure To Consider The Impact Of The Programming Requirements Rule On The Interrelated Syndication And Financial Interest Rules Constitutes Reversible Error.

The Prime Time Access Rule was adopted neither in a vacuum nor as an isolated regulatory effort. It was considered in the context of and adopted to operate conjointly with the two other rules affirmed at the same time by this Court: the Syndication and Financial Interest Rules. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 476. Indeed, as the Commission reminded the Court in its joint defense of the three rule package, all parts of which were separately attacked in the Mt. Mansfield case, "the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more than the effect of each taken singly." National Broadcasting Co. v. United States, supra, 319 U.S. 190, 197.

Thus, just as the purpose of the Syndication and Financial Interest Rules "to encourage the 'development of diverse and antagonistic sources of program service'" was coupled with an additional purpose, "to prevent indirect circumvention of the access rule,"^{100/} so too does the Access Rule work both to achieve its own direct end and to facilitate operation of the other two rules. And thus, just as "the reasonableness of the financial interest and syndication rules must be considered not in the abstract but in the light of their relation to other elements in the total regulatory scheme,"^{101/} so too must the reasonableness of the present rules. So viewed, they manifestly and impermissibly "frustrate a comprehensive, pervasive, regulatory scheme."

^{100/} Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 476.

^{101/} Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 485.

General Telephone Company of California v. F.C.C., 413 F.2d 390, 402 (D. C. Cir. 1969).

When so viewed it becomes clear that just as "the financial interest rule" when "viewed in the context of the purposes of the prime time access rule ... may well be a necessary tool to forward the development of the strong independent suppliers who will be needed in the newly created market if the aims of increased diversity and decreased network dominance are to be accomplished,"¹⁰² the Prime Time Access Rule may well be an equally necessary tool to forward the aim of strengthening the independent suppliers. Certainly the record shows that it has so far had such an effect -- that it has in fact operated to prevent what otherwise could have been an unanticipated and counterproductive side effect of both the Syndication and the Financial Interest Rules, a side effect likely to reappear under the radically truncated rule here challenged.

This side effect of the Financial Interest and Syndication Rules was that the networks, which before adoption of the access package, had traditionally offered full financing to independent producers of network prime time program pilots, were no longer willing or realistically able to offer full financing because it comprises two elements: the network license fee, which remained available, plus all additional costs of the pilot which were previously advanced in exchange for subsequent rights the networks are now barred from holding by the Syndication and Financial Interest Rules. With the typical ingenuity of the marketplace, however, upon which the Commission had so strongly relied in adopting these rules, the Access Rule came to the rescue of its companion rules.

Thus at least one new company created by the Commission's Syndication Rule is now both enhancing its own future prospects and the aims of all three rules by utilizing its monthly cash profits from

¹⁰²/ Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F 2d 470, 486.

distribution of the access programs^{103/} of independent syndicators to advance to independent producers for networks the difference between the license fee still paid by the network and the actual cost, a sum the networks cannot now bargain with respect to, but a sum which spells the difference for the producer between independence and employment by the network or the major studio which alone can afford the full price of its own pilots.

While the general question of the detriment incident upon piecemeal tinkering with isolated parts of one of three interdependent rules has been addressed by parties throughout this proceeding, the specific example contained in the preceding problem and its solution had not yet even become apparent by the time the last pre-Report and Order presentations were made in July of 1973, and it was thus brought to the Commission's attention only subsequent to issuance of the Report and Order.

Thus, while the silence of the Report and Order on the general subject remains a mystery, its silence on the specific example is manifest proof of the propriety of the Commission's conclusion that it is too early to reevaluate the Access Rule. Indeed the Syndication Rule did not even become effective until June 1973, three months after reply comments were filed in this case.

It is particularly ironic that the Commission itself should now by adopting these rules, create this kind of potential interference with the successful response of the access industry to its newly created marketplace. In 1970 the network opponents of the three rule package contended that the very loss of network risk capital from the marketplace which in fact, as above noted, followed from adoption of the Syndication and Financial Interest Rules, would diminish the programs available to the public and thus defeat at least the diversity aim of the rules. At that time the Commission was content to rely on its

^{103/} This monthly cash flow position is essentially unique to the distributor of first run syndicated programs to stations.

prediction, coupled with the assurances of independent producers, that the loss could be overcome. Its prediction and the producers' optimism having now been proven sound, the Commission does not even discuss the possibility that its new rules may prove the networks to have been prophetic.

The record also demonstrates the high probability, if not the certainty, that these changes will defeat at least one specific and affirmative purpose the Commission originally intended to achieve through joint operation of these three rules: creating a continuing first run life (rather than just a syndicated "after life" for rerun episodes) for cancelled, independently produced network shows, by requiring networks to relinquish their unused or no longer used first run use rights after a reasonable time. Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 399. The requirement of relinquishment itself is unaffected by these changes, but the utility of that relinquishment to an access producer is lost if he cannot place the show. The cutback in total access time alone make such placement problematical in the future. But there is a more important factor: because the vast majority of network prime time shows are of hour length (or more) and because the present rules preclude any hour access show, the likelihood of this intent of the three rule package ever again being achieved is vanishingly small. Nor would this be a small loss; the two prime time television programs now viewed over more stations than any other (network or non-network), as the record demonstrates, are Lawrence Welk and Hee-Haw, both hour long access shows formerly seen in network prime time but cancelled because their networks disliked their "demographics" (i. e., the composition of their audiences, which in the first case was too old and in the second too rural). Both these shows, although already strongly estab-

lished in access time, will probably go out of production this year. ^{104/}
Others, not now so established, manifestly cannot follow their lead in choosing the access route in any event.

It is not petitioner's contention that this Court should reach any judgment as to the propriety or impropriety of the Programming Requirements Rule in light of its effect on the two rules which remain ostensibly intact, nor even that this Court adopt any view as to whether there has even been an effect. This matter is urged for two other and independent reasons, however, for both of which this Court is asked to consider it: First, the Court is asked to consider this matter because it both confirms the Commission's conclusion that it is too soon to evaluate the Access Rule and demonstrates why the only rational Commission action upon reaching that conclusion was to terminate or shelve this proceeding, leaving the Rule fundamentally intact pending sufficient information on which to base an informed public interest judgment. And second, this Court is asked to consider this matter to the extent of requiring the Commission to justify its own failure to do so, despite the fact that it urged to this same Court in defense of both halves of the access regulatory package as originally written, that each was essential to the success of the other and that both were essential to achievement of the overall regulatory goals of increased diversity and decreased network control.

The Commission's present silence on a matter held so crucial three years ago that it specifically dictated at least part of this Court's

^{104/} This particular matter is discussed in affidavits earlier filed with this Court in connection with NAITPD's stay petition. Although the Commission found these contentions inconclusive, it did so primarily because of three factors found wholly inadequate to creation of a base for successful syndication in the original Report and Order: The availability of network prime time (Contra, Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 386-87); sale to independent stations (Id); and use in fringe time ("The success of syndicated programs in 'fringe' time periods is not substantially relevant." Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 394). See Memorandum Opinion and Order Denying Stay, F.C.C. 74-221, released March 6, 1974, page 3. This document appears at page 180 of the Joint Appendix.

decision affirming the access regulatory package,^{105/} is sufficient in itself to render the decision now in issue unreviewable. 'Coupled with the Commission's present judgment that reevaluation of the Access Rule would be premature, it renders the rules now in issue irrational ab initio.

D. The Commission's Explicit Resolution Of The Questions Before It In This Case In Terms Of The Appropriate Balance Between Competing Private Interests Constitutes Reversible Error.

It has been clear since the origin of the Communications Act that it "is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather, it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." F.C.C. v. Pottsville Broadcasting Co., supra, 309 U.S. 134, 138.

In its conduct and resolution of the present case, the Commission has both wholly lost sight of the second proposition and fallen, for what may well be the first time in its long history, directly into the conduct proscribed in the first proposition. Explicitly fundamental to the most far reaching provisions of the new rules and implicit in both all of the remaining provisions and its entire reasoning process in the challenged Report and Order, is the conviction that the Evening Programming Requirements Rule represents the most reasonable balance attainable among the competing claims of private parties. Necessarily, in light of this decisional premise, the "public interest," normally found at the heart of Commission actions, becomes some vengeful force lurking in the wings, whose "demands" must be "satisfied" but who otherwise has no part in these deliberations. And, perhaps

^{105/} See Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 486.

equally necessarily, the Commission essentially gives reasons only for what it does not do and never for what it does do. Possibly the one paragraph in the whole Report and Order most thoroughly exemplary of all these matters is the following:

In reaching this decision, we recognize that it may in some cases work to the disadvantage of independent stations, in that they may for the first time under the rule be faced with the competition of popular off-network material during the first half-hour. However, we do not regard this as a serious reason not to adopt this change. While probably the advantage which the independents have at present for a full hour is, overall, in the public interest, nonetheless the rule in this respect represents a form of disparate treatment of competing entities, and therefore should not be carried further than it can really be justified. We conclude that the remaining half-hour of this advantage to the independents is sufficient to satisfy the demands of the public interest.

Report and Order, supra, paragraph 81.

Insofar as the Commission's reference to "competing entities" in this paragraph might at first blush appear simply an appropriate reference to the dynamics of the broadcast marketplace, it should be borne in mind that the "disparate treatment" referred to was an affirmative goal of the Access Rule because of the prevailing unequal competitive position of independent stations.

Nor was this an isolated lapse. With respect to the entire matter of "the network increase and retention of five or six 'cleared' half hours," which the Commission itself characterized as "probably the crux of the decision we are required to make at this time in this proceeding," the rules adopted were explained and justified as "representing an adjustment of competing demands for access or for exclusive access," with respect to which "we have reached what, at this point, appears an appropriate balance" although admittedly, "it may be that, like many compromises, this will entirely please no one." Report and Order,

supra, paragraph 82. Apparently the Commission thinks it should, however, for "this provides the networks with opportunity to increase their programing" and at the same time "reserves either five or six half-hours per week cleared [time]." Id. While the Commission does assert that "it represents certain judgments which we believe are required by the material set forth above," the Commission neither identifies what material it means, why it requires the changes nor why the material set forth below (including the specific finding that it is too soon to evaluate the rule's performance^{106/}) is not also relevant. Id.

The Commission's view of its function as referee invades not only its conclusions but also its analysis. Thus, for example, in reviewing the Rule's achievements, it interprets its function as comparing the pre-Rule and post-Rule program quality, reaching such conclusions as that since off-network reruns were often "stripped" (i. e., the same show was run several days in a row at the same time) at 7:00 p. m. before the Rule, and newly produced syndicated shows now are, and since "we do not view a contest between stripped game shows and stripped off-network material as one the Commission can profitably get into,"^{107/} the time will be returned to stripped off-network material. In this connection, the Commission further fails not only to examine the possibility (which the evidence would appear to suggest) that stripping is a function of the time period, but also to mention its own statement in the Notice that it is a station practice the Rule ought perhaps to be so designed as

^{106/} Report and Order, supra, paragraphs 89-91.

^{107/} Report and Order, supra, paragraph 79.

to protect. Indeed, and incredibly in light of its present unexplained condemnation of that practice, the Commission said in the Notice that its primary reason for not adopting a so-called "21 hour" rule which would prescribe a weekly rather than daily amount of cleared time, was the "belief that time should be available to non-network program sources on a regular basis, the same period each night or at least not varying from week to week, in order to encourage the development of such material, for example programming suitable for 'stripping' in early prime time." Notice, supra, 37 F.C.C. 2d 900, 913.

Moreover, wholly unstated here or anywhere else is the public interest detriment inherent in quiz shows, the most often stripped of which (such as To Tell The Truth and What's My Line) have been among the most widely popular shows on prime time television for years, both as network and as syndicated material. Absent such an explanation, it can only be inferred (especially in light of the reference in the same paragraph to "material which needs the rule's encouragement") that the network show producer who has continued to make his show in syndication, thus assuming all the risks and independence thereof (a category which includes such shows as Hee-Haw, Lawrence Welk and Let's Make a Deal) is not to be encouraged. Again, however, the Commission does not refer to its

original finding that a benefit of the Access Rule, coupled with the two companion rules, would be to permit this, ^{108/} thus allowing the public as well as the network program director to express a view on its programming, since while networks cancel their shows for many reasons, of which popularity is only one possible factor (and not a factor with any of the three shows noted above, as the record reflects -- rather they were not watched by the audiences network advertisers and/or "image makers" wished primarily to serve), a syndicated show relies much more directly on how it is received by local audiences. ^{109/}

Still further examples of the "balancing" or "contest" analysis employed by the Commission include its justification of revocation of the Rule at 7:00-7:30 on the ground that it would "relieve the problems of the 'majors'" by permitting use of off-network material in that time period -- this of course also being the "contest" the Commission had just said it did not intend "to get into." ^{110/} Nor does the Commission explain why,

^{108/} See, e. g., Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 399.

^{109/} Similarly, of course, it can also survive unpopularity in certain parts of the country because it is sold to one station at a time, unlike the network show, which must be popular everywhere.

^{110/} Report and Order, supra, paragraph 80.

when the Access Rule was designed to create those problems (at least insofar as they are inherent in exclusion of off-network material from access time), it must now be revoked to solve them, even though the record established that almost all major studio parties to this case made record breaking profits despite the Access Rule (to which the Commission elsewhere alludes indirectly in noting that the majors' profits, unlike the independent syndicator's, also to an unknown extent come from wholly unrelated activities).

Additional examples of the Commission's practice of rejecting attacks on the Rule and then concluding that they therefore do not justify revoking more of the Rule than has already been revoked -- for no stated reason -- abound. Having labeled the argument "that only the networks have the resources or the fortitude to start a 'different' or controversial program and to continue with it when it is not initially popular" as "much too speculative" in view of the "uncertainty" as to whether returned time would be so used by the networks, "the fact that we cannot at this time evaluate the rule's full potential with respect to the programs which are likely to be offered and presented in the future. . . and the problems [historically] presented in programing the 7:30-8:00 p. m. period," the Commission concludes that this argument does not justify modification of the Rule "beyond the increase in permissible prime time mentioned, " i. e. gutting the Rule. Report and Order, supra, paragraph 96, footnote 41.

Again, having found that decrease in network dominance under the Rule is "definite and readily apparent," the Commission concludes that the rejected contention that it has increased does not offer "any reason,

at this time, to act to relax the rule any more than indicated above." Report and Order, supra, paragraph 97. The Commission does not explain why a specifically rejected argument does justify revoking most of the Rule.

Again, having found the problems of Hollywood and use of foreign product to be beyond the ambit of the Commission's expertise and jurisdiction and also unproven to be attributable to the Rule, "we conclude that they do not afford a basis for any present relaxation of the regulation beyond that adopted herein." Report and Order, supra, paragraph 98. The Commission does not explain how unproven charges in an area over which it has neither jurisdiction nor expertise can afford a basis for the cutback in access time which they were found to justify.

Again, having acknowledged that to permit off-network reruns is basically more destructive to the goal of the Rule to encourage new programing than to permit new network material, and is also, if anything, more destructively competitive for the access producer, the Commission concludes that "we are not prepared to go further than" allowing it to be used during more than half the time from which the Access Rule now wholly bars it. Report and Order, supra, paragraph 106.

Similar rulings are made with respect to every rule change adopted. The only reason given for adopting the change is that it will balance the private interests of those who wish no rule against the interest the rule was designed to advance for the benefit, not of non-network producers, but of the viewing public they would for the first time be enabled to serve in prime time.

In arriving at this uniquely impermissible analysis, which views the public interest as having little real part in the deliberations, the Commission has done another rather extraordinary thing. It has apparently simply forgotten that NAITPD, while it is of course essentially a creation

of the Access Rule, which permitted the activity in which its members are engaged, is in fact only a private party to this case, representing a very limited number of producers whose success and courage have both been sufficient to permit them to "surface" despite the dangers inherent therein for those whose livelihood depends also (and now perhaps exclusively) on dealing with the networks as customers. The Commission seems rather to have viewed NAITPD as the spirit of public interest past, assuming that it falls on NAITPD and not the Commission itself to represent all the interests the Access Rule was designed to serve. And worse, the Commission seems to view NAITPD as itself constituting all the Rule has achieved. Thus, whatever consideration of basic matters central to the original Access proceeding NAITPD can force the Commission to undertake, is all the consideration these matters receive. This overlooks the well established fact that "the primary responsibility" is the Commission's; "its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering [relevant matters] at every distinctive and comprehensive stage of the process. . . ."Calvert Cliff's Coordinating Committee, Inc. v. A.E.C., 449 F.2d 1109, 1119 (D. C. Cir. 1971).

Because the Commission's failure to take the initiative has been clear since the start of the proceeding, NAITPD has attempted to "stand in" for all the interests it should not have to represent, filing hundreds of pages of comments on matters not of material relevance to its members and even suggesting actions specifically detrimental to its members because they seemed to serve the public interest. Obviously, however, a private party with a private stake has a hard time convincing anyone that it is in fact defending the public interest as well as, and sometimes instead of, its own. And an administrative process which puts a private party in that

position is at best ludicrous. ^{111/}

The functions NAITPD has attempted to perform in this case are functions incumbent on the Commission, functions it has been clear from the start it did not intend to perform. See Separate Opinion of Commissioner Johnson, 37 F.C.C. 2d 925, 927. It is the Commission which represents the public and the Commission which had a record to make in this case. See Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2d Cir. 1965); Office of Communication of United Church of Christ v. F.C.C., 425 F.2d 543, 548 (D.C. Cir. 1969). Yet the only extensive evidence on the performance of the Rule was either put in the record by those not only not involved in non-network production but also attempting to achieve its revocation, or by NAITPD itself, ^{112/} which is hardly a major research group, being a group composed of people whose livelihood depends solely on competing with each other. ^{113/}

In short, even were this proceeding not reversibly defective by reason of the substance of what was one, why it was done, and what was

^{111/} Nor would the case have been different had NAITPD in fact been the public interest intervenor as which it was treated and attempted to serve, for in such a case "it was not the correct role of the... Commission to sit back and simply provide a forum for the [NAITPD]; the Commission's duties. . . began at that stage." Office of Communication of United Church of Christ v. F.C.C., 425 F.2d 543, 548 (D.C. Cir. 1969).

^{112/} This statement must be qualified to the extent that the Association of Independent Television Stations performed in much the same capacity as did NAITPD, although with apparently even less success, since the Commission, which adopted the Rule in part to correct the non-competitive position of such stations, now apparently sees them as having unfair advantage over affiliates through operation of the Rule. See, e.g., Report and Order, supra, paragraph 81.

^{113/} The fortuitous presence of NAITPD makes it no less "unrealistic to assume that there will always be an intervenor with the information, energy and money required" to bear the Commission's public interest obligations for it. Calvert Cliffs' Coordinating Committee v. A.E.C., supra, 449 F.2d 1109, 1118.

not considered, it would in any event be reversibly defective by virtue of the manner in which these substantive tasks were performed. Not only has the Commission wholly omitted the public interest from its deliberations, leaving no record to review, but it has also wholly abdicated its duty to provide "appropriate administrative control," viewing itself as the referee in a proceeding designed solely for the "adjustment of conflicting private rights." F.C.C. v. Pottsville Broadcasting Co., *supra*, 309 U.S. 134, 138. While the mandate of Pottsville is as old as the Act:

[In] recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated. *See, e.g., Udall v. FPC*, 387 U.S. 428 (1967); Environmental Defense Fund, Inc. v. Ruckelshaus, . . . 439 F.2d 584 [D.C. Cir. 1971]; Moss v. C.A.B., . . . 430 F.2d 892 [D.C. Cir. 1970]; Environmental Defense Fund, Inc. v. U.S. Dept. of H.E.&W., . . . 428 F.2d 1083 [D.C. Cir. 1970]. In commenting on the Atomic Energy Commission's pre-NEPA duty to consider health and safety matters, the Supreme Court said 'the responsibility for safeguarding that health and safety belongs under the statute to the Commission', Power Reactor Development Co. v. I.U.E. R.M.W., 367 U.S. 396, 404 (1961). The Second Circuit has made the same point regarding the Federal Power Commission: 'In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.' Scenic Hudson Preservation Conference v. FPC, . . . 354 F.2d 608, 620 [2d Cir. 1965].

Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., *supra*, 449 F.2d 1109, 1119.

The right of the public has been flagrantly and reversibly ignored by the Commission in this case.

II. THE EVENING PROGRAMMING REQUIREMENTS RULE VIOLATES THE FIRST AMENDMENT; 47 U.S.C. §326; AND THE LICENSING SCHEME OF THE ACT.

A. The Programming Requirements Rule Is In Derogation Of The Mandate To Diversify Program Sources On Which The Commission Rested Its Authority To Promulgate Regulations In This Area.

The challenged regulations unconditionally return 57% of access time (8 of 14 weekly half hours) to network produced material because access material has been found to be inferior in the Commission's judgment; they conditionally return a minimum of 16 2/3 and a maximum of 100% of what remains because certain types of network material are superior in the Commission's judgment to anything else which might come from any other sources. The Report and Order adopting these rules specifically characterizes them as minor modifications of the Access Rule, which share the historical and legal foundations and fundamental objectives of that Rule.

The Access Rule imposed certain purely temporal limits on the permissible amount of network originated prime time "speech," limits which were premised on the fact that "the unique structure of the broadcast media requires a determination as to who will have priority in the exercise of First Amendment rights when there is a potential conflict" and the further fact that "the Supreme Court has ruled that the public's right to access must prevail over all other claims"^{114/} because "the

^{114/} Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477.

people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.^{115/} And finally, the Access Rule was premised on the fact that "the First Amendment stems from the premise that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . .'" Associated Press v. United States, 326 U.S. 1, 20. . . ." Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477.

These being the premises on which the Commission based its authority to undertake the kind of restraint on speech which the Access Rule admittedly constituted, it followed logically and necessarily that "it is not our objective or intention to . . . promote the production of any particular type of program -- whether or not it be included within the present category of quality high cost programs."^{116/} On the contrary, "the types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop. . . ."^{117/} a self

^{115/} Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 395 U.S. 367, 390.

^{116/} Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 397.

^{117/} Id.

imposed restraint cited by this Court in affirming the Commission.^{118/} While "the history of television programming indicates that" the Commission's action in "removing the three-network funnel" would "result in a greater diversity among individual programs", such a result would be strictly left to "the decision of the marketplace" since "as we have repeatedly emphasized, it is not our intention to set up standards of 'diversity and quality' in television programming, " standards which in any event would be unattainable in a commercial television system. Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 411.

In sum, in adopting the Access Rule the Commission was at pains to ensure that it did its intended job of removing "a detriment to the public's ability to receive diverse programming,"^{119/} without itself reimposing that very same detriment through substitution of a Commission restraint for that previously imposed by the networks.

And in affirming that action this Court made very clear the fact that it joined in the Commission's views that its power was limited to opening the market, that that power was a "duty" as well, and that the purpose of doing so would be defeated were the Commission itself thereupon to dictate how or with what or by whom that opened time was filled:

^{118/} Mt. Mansfield Television, Inc. v. F. C. C., supra, 442 F.2d 470, 480.

^{119/} Mt. Mansfield Television, Inc. v. F. C. C., supra, 442 F.2d 470, 478; National Broadcasting Co. v. United States, supra, 319 U.S. 190, 226-27.

. . . Congress did not want the Federal Communications Commission to become a censoring agency. But the challenged regulations are not an exercise of censorship powers. The Commission has found that the wide range of choice theoretically available to licensees is either not in fact available or is not being exercised for economic reasons.^{120/} It has acted in discharge of its statutory duty in seeking to correct that situation. The Commission does not dictate to the networks or the licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast.

Mt. Mansfield Television, Inc. v. F. C. C., supra, 442 F.2d 470, 480.

The Evening Programming Requirements Rule now undertakes to do all three of the things whose absence justified the Access Rule. It dictates to the networks conditions on which they may occupy what little would otherwise remain of access time; it both warns licensee's how to program what time they retain control over ^{121/} and tells them that because in the Rule's first year they picked programs the Commission disliked they will lose most of their option henceforth; and it instructs the access producer to cancel 57% of his plans for any kind of show and 100% of his plans for shows in the categories which networks "do better:" documentaries; pub-

^{120/} In this connection the Commission had stressed that the networks dominated not only prime time but their affiliates as well, making them in some cases "so dependent on national networks that their economic viability... [turns] on whether they continue to receive revenues from" the network programming precluded by the Rule, a situation preventing "proper discharge of their broadcast trusteeships" and emphasizing "the need for Commission action... to reestablish licensee individuality and responsibility as operable factors in television broadcasting." Order on Reconsideration, supra, 25 F. C. C. 2d 318, 329-30.

^{121/} Report and Order, supra, paragraph 88. In this connection, however, it should be noted that since the kind of material stations are asked to use in access time is mandated by the Act in all time periods, the real meaning of this warning appears to be: "Don't preempt network shows to broadcast valuable public service material; instead preempt non-network shows because we don't think they are as good anyhow."

lic affairs; children's specials; and programs "related to" news subjects,^{122/} since if he makes these shows he must meet the "insurmountable"^{122/} competition of network material.

In short the three network funnel has now become the Commission sieve, through which every program seen from 7:00-8:00 p.m. will henceforth be strained. Moreover, the programs to be seen in the time period will once more predominantly emanate from the three networks, albeit in some cases only after satisfying the Commission of their compliance with its definitions of network produced programs acceptable for broadcast in non-network time. (See Argument II D, infra).

B. The Programming Requirements Rule is Unconstitutional And Unlawful Because It Imposes Specific Restraints On Speech Which Have The Intent And Effect Of Inhibiting Rather Than Enhancing Speech Generally And Of Undermining Licensee Responsibility.

The unique breadth of the Commission's mandate under the First Amendment is premised solely on the limitations of the broadcast medium, which require it to restrain the speech of some to maximize diversity of overall speech in order to protect the paramount right of the public to receive the widest diversity of ideas and information from the largest possible number of sources.^{123/} The Access Rule was designed to carry out this mandate. The Program Requirements Rule is designed to use the breadth of the mandate to achieve ends in direct opposition to it.

^{122/} Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 386.

^{123/} Red Lion Broadcasting Co., Inc. v. F.C.C., supra; Associated Press v. United States, supra; National Broadcasting Co. v. United States, supra; Mt. Mansfield Television, Inc. v. F.C.C., supra.

While the Commission has many times and in many areas adopted rules which restrain specific speech, it has invariably done so for the sole reason that the specific restraint achieved the larger end result of enhancing speech, either by the same entities restrained^{124/} or on behalf of entities whose conflicting free speech rights were of a higher priority.^{125/} And in so doing the Commission has invariably been guided not just by the imperatives of the First Amendment and the concurrent restraint of 47 U. S. C. §326 which forbids the Commission from censoring, but also by its mandate under the Communications Act to ensure the "larger and more effective use of radio in the public interest." 47 U. S. C. §303(g).

It was in light of these considerations that the Access Rule was adopted. Indeed it was adopted in the face of the fact that one of the most strongly pressed contentions throughout the rulemaking proceedings and on appeal was that a great deal of "worthwhile" existing programming would necessarily be barred from broadcast during access time by enforcement of the Rule. The Commission rejected these contentions then because the record demonstrated that the ultimate achievement of the "widest and most effective use of radio" (47 U. S. C. §303(g)) required this minimal intervention to prevent subordination of the public interest

^{124/} See, e.g., Lafayette Radio Electronics Corp. v. F. C. C., 345 F.2d 278 (2d Cir. 1965); California Citizens Band Ass'n., Inc. v. F. C. C., 375 F.2d 43 (9th Cir. 1967).

^{125/} See, e.g., Red Lion Broadcasting Co., Inc. v. F. C. C., *supra*; National Broadcasting Co., Inc. v. United States, *supra*; Mt. Mansfield Television, Inc. v. F. C. C., *supra*; Buckley - Jaeger Broadcasting Corp. v. F. C. C., 397 F.2d 651 (1968).

to "monopolistic domination," a function so hoary that it spurred original adoption of the Federal Radio Act in 1927. F. C. C. v. Pottsville Broadcasting Co., supra, 309 U.S. 134, 137.

In taking the present action the Commission has neither explained why these priorities should now be reversed and once rejected arguments advanced by the same parties on the same evidence now accepted; nor addressed the graver problem of the fact that the kind of programing consideration now involved is no longer general but based on specific programs and specific types of programs. It has long been the Commission's own view that such government intervention in speech as is here involved is categorically impermissible because it flies in the face of the fact that "the most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any government dictation as to what they can or cannot hear. . . ." Report on Editorializing by Licensees, 1 Pike and Fischer R. R., Part 3, 91:201, 211 (1949).

The Commission's present adoption of the posture of super censor of what programs may be made by whom for viewing by the public when, does equally grave violence to the licensing scheme of the Act, for it is in some respects the licensee who is most injured. While the infringed First Amendment rights of the public are paramount to those of others restrained by this Rule, the licensee is losing something more: the right and duty written into the Communications Act by Congress, and interpreted by the Commission and the Courts, to be the sole "trustee"^{126/}

^{126/} Red Lion Broadcasting Co., Inc. v. F. C. C., supra.

for his own audience, subject only to the Commission's right of statutory oversight, through the licensing process,^{127/} to determine whether he has performed that duty with diligence, consistent with the needs and interests of his own local audience^{128/} as he and his own audience alone have defined them.^{129/} The whole theory which informs the local service concept of the Commission's allocation of frequencies is that just as people differ so too do communities and their programing needs,^{130/} a further reason why the access concept was adopted, because, unlike the networking process, it permitted both locally made programs and locally selected programs to be shown in prime time. The importance of the Rule to licensees was especially stressed at the time of its adoption because it was designed to enable them for the first time "to exercise the appropriate freedom of choice and the responsibility for television service which are essential to the proper discharge of their broadcast trusteeships." Nor was mere adoption of the Rule viewed as an end to their responsibilities, since "licensees share the responsibility to maintain healthy competition and should actively encourage the development of new and diverse program sources." Order on Reconsideration, supra 25 F. C. C. 2d 318, 329.

^{127/} 47 U. S. C. § 309, § 311; Red Lion Broadcasting Co., Inc. v. F. C. C., supra.

^{128/} 47 U. S. C. § 307(b); F. C. C. v. Sanders Bros. Radio Station, 309 U. S. 470, 475 (1940).

^{129/} Henry v. F. C. C., supra.

^{130/} 47 U. S. C. § 307(b); F. C. C. v. Allentown Broadcasting Co., 349 U. S. 358 (1955).

Moreover, while the de facto impotence of licensees to perform this duty during network time required adoption of the Access Rule, their mere reluctance to perform it during the newly created non-network time clearly is a matter under their own control, for which they can and should be taken to account as individuals, since the fault is both correctable and limited to certain identifiable licensees rather than being the universally shared problem presented in 1970. To withdraw from all a freedom as yet ill used by some when the means exist to do otherwise is not only imprudent administration generally, but inconsistent with the basic mandate guiding Commission action in this area since long before the Access Rule. As the Commission noted in this regard in its Order on Reconsideration, quoting from the earlier Option Time Case, 34 F. C. C. 1103, 1120: "We have indicated herein that it is to be expected that the removal of this artificial restraint on competition between program sources and advertisers [option time] will result... in improvement of competitive conditions and the position of the 'fenced out' groups (e.g. more first run syndicated film production). Even if it were not, however, we would take the action we adopt herein on the principle that freedom of choice to the licensee should be preserved." Order on Reconsideration, supra, 25 F. C. C. 2d 318, 329, footnote 26.

In adopting the present rules, the Commission has taken an action which withdraws from the licensee in significant measure the right to select his own programming, either national or local, either network or non-network; and has done so solely on the basis of its own blanket judgment

as to what kinds of programs are good for all the people of the nation to see and what kinds are not. "This approach" of the Commission "sweep[s] . . . widely and . . . indiscriminantly' across protected freedoms" and is therefore impermissible under any circumstances for any reason. Banzhaf v. F.C.C. 405 F.2d 1082, 1095, cert. denied sub nom. Tobacco Institute v. F.C.C. 396 U.S. 842 (1969). Thus even if the Commission has any right to undertake the type of critical function involved and even if the critical judgments thereupon reached are either permissible in the abstract or supported on the record, the action based on those judgments is illegal. It remains the law that even if the Access Rule "has not always brought to the public perfect or, indeed, even consistently high-quality [programs] . . . the remedy does not lie in diluting licensee responsibility." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 130-31 (1973).

If in fact the Commission finds that a particular licensee is disserving the public -- in his choice of access programing or any other programing, the Commission already has the right, the duty and the statutory tools to deal with that situation. It is well established that licensee choice exists for the right of the public and not those who exercise it; if for any reason a station's programing is unresponsive to the needs of its listening audience, it may not be licensed in the first instance: no service is preferable to unresponsive service.

131 / Henry v. F.C.C., supra; Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1965); Edwin R. Fischer v. F.C.C., 417 F.2d 551 (1969).

Thus the Commission has no more need than it has right to reinstate a prime time monopoly found to infringe the paramount First Amendment rights of the public simply in order to deal with what it deems to be unwise program choices by some of its licensees.

Moreover, in thus ignoring the availability of the statutorily granted tool of the licensing process to ensure wise program choices by licensees, the Commission is solving the problem of their alleged poor judgment by depriving them, independent producers, and above all the public, of the right to choose any but network programs.^{132/} Moreover in declining to act with respect to individual licensees guilty of what it deems actionable bad judgment, the Commission is not only punishing the innocent with the guilty but is also dealing more harshly with the guilty than its own precedents would support if the speech involved were specifically prohibited rather than simply amounting to programs the Commission dislikes. See, e.g., Lafayette Radio Electronics Corp. v. F.C.C., supra, 345 F.2d 278, 281, wherein Constitutional attacks on the citizens radio "chit chat" rules were turned back because, among other reasons, even though borderline cases could conceivably arise where licensees, in good faith, violated the Rules, "except in the most flagrant cases, the Commission does not invoke the [applicable] sanctions of revocations or fines..., save after giving the licensee warning and opportunity to mend his ways." Where, as here, nei-

^{132/} Nor is such Draconian logic limited to this instance: In exchanging frequent waivers of the off-network rule, to which NAB and others had objected as creating an uncertain market, for revocation of half the access period, the Commission incredibly explained that this would give access producers "certainty;" i.e. certainty of no market at all.

ther rule nor standard has been infringed it is manifest that the "elementary canons of administrative and constitutional law prevent the Commission . . . from condemning a station's overall programming as inimical to the public interest" without providing "advance notice of its views" as to the stations' responsibilities. Banzhaf, v. F.C.C., supra, 405 F.2d 1082, 1095. The Record herein offers no indication that prior to returning to the networks most of the time given its licensees in 1970, the Commission cautioned licensees, generally or specifically, concerning any of the views it has now written into law after the fact with respect to appropriate use of access time.

A further infirmity in the present action is that it flies in the face of the Access Rule's original intent to stimulate production of new programs from among which licensees could choose. The Commission admits in the Report and Order that the production record is not unsatisfactory but revokes most of the rule because what it deems the least satisfactory programs were those most popular with licensees. ^{133/} Indeed

^{133/} Moreover it does so despite the fact that the "too soon to tell" argument applies with double force to licensees, since, as the Commission notes, they have a "historic preference . . . for the 'tried and true' which takes time to overcome." Report and Order, supra, paragraph 89. This is especially significant in view of the total inexperience of station program directors with selecting their own programming in prime time. Now, all of a sudden, they must not only select programs but rely for their jobs and maybe even the success of their stations on the economic wisdom of those choices, since they must now sell their own time rather than simply plug in the network feed and receive their nightly network rates. In short, if in fact economics were too heavily weighted in stations' first season choices they can perhaps be forgiven, especially in light of the fact that both they and the Commission at first thought many affiliates would lose money in the early years of the Rule -- a happily false fear, and equally happily, about the only major Commission expectation not borne out by the Rule's operation.

the Report and Order essentially now rejects the standard of available programs as a measure of access producers' success. Report and Order, supra, paragraph 92, footnote 39. Under the new standard of what programs are chosen, producers are clearly totally unable ever to prove themselves by their own merits. Not only is what remains of the Rule at the mercy of the Commission's taste; but also of licensee's taste, which will be held not against them but only against the Rule, to the ultimate detriment of the public and everyone else but those who seek full reinstatement of the networks' prime time monopoly.

C. The Evening Programming Requirements Rule Is Anti-Competitive.

The rules here adopted admittedly reinstate the network program monopoly for a majority of the previously cleared prime time, and in probable effect for all of it, both because of the paucity of time still cleared and because of the uncertain and irregular availability of even those few half hours. When the Access Rule was adopted, the Commission's analysis did not stop with the essentially philosophical judgment that action must be taken to defeat the network prime time monopoly and that offering prime time to non-network sources would assist in this effort. The decade of study which went into that Rule and its two inseparable companions, the Syndication and Financial Interest Rules, included extensive Congressional input, advice from the Anti-trust Division of the Justice Department and years of work by the Com-

mission's own economists, as well as the adversary findings of the parties.^{134/} On the basis of all this the Commission reached a number of much more specific conclusions about how to replace monopoly with competition.

In presently relevant part the Commission determined that the three interdependent rules were all vital, both for the sake of each other and to achieve their joint intent; that the access concept was more suited to these ends than the originally proposed "50-50" rule;^{135/} that such access must be to prime time; that it must be available seven days a week on a regular basis; and that the smallest amount of time which a viable independent syndication industry could be expected to develop around was one full hour a day for which all non-network sources could compete among themselves.

^{134/} While the Commission itself did detailed studies on a number of directly relevant matters, (e.g. effects of the then proposed rules on affiliates, see Order on Reconsideration, *supra*, 25 F. C. C. 2d 318, 328-29), it did not specifically undertake an economic study of the syndication market because a multiplicity of material was already available. (See Order on Reconsideration, *supra*, 25 F. C. C. 2d 318, 320). The present need for such a study (and see Report and Order, *supra*, 23 F. C. C. 2d 382, 401, clearly manifesting such intent) is underscored not only by the fact that such a market now exists during the centrally relevant prime time period but also by the fact that the Commission's present action would inhibit rather than encourage that market, a circumstance under which it invariably did do its own studies last time, as in the case of affiliates.

^{135/} The 50-50 rule constituted a "limitation on the amount of their evening entertainment schedules which the networks may fill with programs which they themselves own, to 50% of the 6-11 p.m. schedules excluding news." Report and Order, *supra*, paragraph 8. It was replaced by the Access Rule because the latter was concluded to be "somewhat more direct in opening up time for programs and sponsors outside the network funnel." Order on Reconsideration, *supra*, 25 F. C. C. 2d 313, 319, footnote 3.

While many of these matters are recited as historical background in the present Report and Order, the hard fact is that none of them was so much as considered by the Commission when it adopted these changes, which wholly destroy every single one of the cited determinations save the judgment that the access idea was preferable to the 50/50 idea, which no one has in any case since disputed.

Since these determinations, all found reasonable by this Court in the Mt. Mansfield case, have neither been rejected, nor, as noted, even mentioned since, in the relevant context of what constitutes an economically workable marketplace in which to develop the requisite programs, it must be assumed they remain in force. And that assumption alone is fatal to the Evening Programming Requirements Rule because that rule must therefore, on the basis of the Commission's own controlling expert judgment, be viewed as constituting the death knell of the entire access market, not just the 57-100% it purports to destroy.

Even if such action were consonant with the multiple other applicable limitations on the Commission's right to exercise such unbridled discretion as this action represents, it would be improper because it wholly ignores the Commission's statutory duty to foster competition, a duty in light of which the Commission found itself required to adopt the Access Rule less than four years ago, a rule which was only three weeks in force when the Commission bowed to the arguments of NBC and MCA, which it had been fighting off for years, and put the Rule up for grabs.

That the Access Rule's effort to achieve competition in program sources is part of a pervasive regulatory scheme is beyond cavil. Not only does the Commission prohibit joint ownership of stations beyond fixed numbers (47 C. F. R. §73.35, §73.636, §73.240; United States v. Storer Broadcasting Co., 351 U. S. 192 (1956)) but it has also made the consideration of diversification of control of communications media one of the crucial considerations in award of broadcast licenses in competitive proceedings (Policy Statement on Comparative Hearings, 1 F. C. C. 2d 393 (1965)) and the courts have noted that "the importance of avoiding concentration of control in communication is such an important objective that the Commission must be accorded discretion in choice of measures for its fulfillment." Greater Boston Television Corporation v. F. C. C., supra, 444 F. 2d 841, 860.

The recognition that laissez faire economics are no more suited to this special medium than the laissez faire First Amendment approach so fiercely argued for by the networks, without prior success, is inherent in the Communications Act itself which recognized that at a minimum a truly competitive broadcast marketplace requires specific extension of the antitrust laws to the new medium (47 U. S. C. §313); an additional prohibition on direct or indirect broadcast ownership or control which may restrain competition in broadcasting (47 U. S. C. §314); and a further special provision mandating the Commission itself to adopt whatever rules may from time to time be necessary to "encourage the larger and more effective use of radio in the public interest." 47 U. S. C.

§303(g). See National Broadcasting Co. v. United States, supra; F. C. C. v. Sanders Bros. Radio Station, supra.

The Commission's presently unreviewed and therefore undisturbed 1970 judgment that these statutory commands dictated adoption of the Access Rule in its original form, now require, at a minimum, that the Evening Programming Requirements Rule remain under rule-making consideration as an inactive proposal, until such time as the Commission has reached an economic determination, demonstrable on a record, either that the Access Rule as modified can survive despite absence of every single condition originally held vital to its success; or that the Access Rule is not in fact mandated by the statutory standards held to require its adoption in 1970.

D. The Several Provisions Of The Programming Requirements Rule Exempting Network Programs By Type Are Unconstitutional In Substance And Intent.

Several of the challenged Evening Programming Requirements have specific First Amendment infirmities which would render them impermissible even absent the general effect of all the Programming Requirements of inhibiting diversity. Specifically violative of well established and directly applicable First Amendment precepts are Sections 73.658(k)(1)(i) and (ii); ^{136/} and Sections 73.658(k)(2)(iii) and (v). ^{137/}

The first two of these sections permit unrestricted use during one access period per station per week of "children's specials, documentaries or public affairs programming, either network originated or off-network" ^{138/} and offer a definition for the second of the three specified categories:

"'Documentary' programming means any program which is nonfictional and educational or informational, but not including programs where the information is used in a contest among participants." 47 C.F.R. §73.658(k)(1)(i)(ii). The rules provide no definition for "children's specials" and "public affairs programming." Noting that "documentary material" has been "defined rather broadly," the explanatory text continues for two rather lengthy paragraphs. See Report and Order, supra, paragraphs 83 and 84.

The third and fourth cited sections provide that "the following types of material are not considered 'network programming' for purposes of this paragraph, so that they may be presented without limitation during [any or all] the Monday-Saturday periods" from which network and off-network programs are otherwise banned (47 C.F.R. §73.658(k)(2)):

^{136/} 47 C.F.R. §73.658(k)(1)(i), (ii). See Appendix A for full text.

^{137/} 47 C.F.R. §73.658(k)(2)(iii), (v). See Appendix A for full text.

^{138/} 47 C.F.R. §73.658(k)(1)(i).

(iii) Telecasts of an international sports event such as the summer or winter Olympic games, New Year's Day college football games, or any other network programming of a "special" nature other than sports events or motion pictures, when the network devotes all of its time after 8 p.m. E.T. or P.T. (7 p.m. C.T. or M.T.) the same evening to the same programming, or all of it except brief incidental 'fill' material.

* * *

(v) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or programming related to such events. . . .

Portions of both of these exemptions are essential to coverage of events at the time of their occurrence. The first two cited items in the second exemption, for example, "fast-breaking news events" and "on the spot coverage of news," are exempted in the present Rule;^{139/} have been similarly dealt with in other Commission regulations;^{140/} have led to development in those other areas of a considerable body of law dealing with such instances^{141/} as well as a clearly indicated Commission intention to resolve all ambiguities in favour of the licensee;^{142/} and are, for those among other reasons, not here challenged. However, for these same reasons, the introduction here, for the first time, of the third related exemption for coverage of events "related to" either of the foregoing, necessitates

^{139/} 47 C.F.R. §73.658(k)(2) provides that for purposes of access time exhibition "network programs shall be defined to exclude special news programs dealing with fast-breaking news events, on-the-spot coverage of news events. . . ."

^{140/} See 47 C.F.R. §73.123.

^{141/} See, e.g., Dorothy Healey, 24 F.C.C. 2d 487 (1970), affirmed, 460 F.2d 917 (D.C. Cir. 1972); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

^{142/} See, e.g., Network Coverage of Democratic National Convention, 16 F.C.C. 2d 650 (1969); Mrs. J. R. Paul, 26 F.C.C. 2d 591 (1969); KMPC, Station of the Stars, Inc., 14 Fed. Reg. 4831 (1949).

that henceforth this area will receive different interpretive treatment in the Access area from that accorded it in other areas. In explaining its addition of this category in the Report and Order the Commission indicates its intent to go beyond the "on the spot" and "fast breaking" exemptions, "liberalizing slightly the exemption now in the rule" to "make it clear that when an important event occurs, warranting unusual network coverage, that coverage need not consist only of on the spot material, but may include programing such as the CBS broadcasts in the evening of the death of former President Truman (interview with him filmed some years ago)." Report and Order, supra, paragraph 103. Neither the rule nor the text limits the "related to" exemption to this type of situation, however. Nor does the text treat the question of why an obituary or other "non-live" program could not either be delayed the maximum of 30 minutes now involved in using network rather than access time or broadcast as a "documentary" already subject to exemption once a week.

With respect to the "special telecasts" exemption of 47 C.F.R. §73.658(k)(2)(iii) the Commission's textual explanation of the exemption reads in full as follows:

. . . We are adopting herein the suggestion of the parties that when a network devotes all or substantially all of its prime time to a certain type of special programing, use of the additional half-hour between 7:30 and 8 for that purpose should also be permitted (the "Summer Olympics" type of situation, which all commenting parties agreed should have been the subject of waiver). The chief problem in this connection is what should be considered "special" programing, particularly as to evening sports events -- fairly common, as noted above -- and movies, e.g., a four-hour presentation such as The Ten Commandments. If left without limitation, it would be fairly easy for the networks to arrange their schedules so as to include such programing to an extent which would be an inordinate impingement on the availability of the access period to non-network sources. Likewise, it appears undesirable to attempt to define exactly all of the kinds of material, sports events, etc.,

which would warrant such treatment. Accordingly, we limit the exemption on this basis to: (1) international sports events (Summer and Winter Olympics, and perhaps some others such as Pan-American games), (2) New Year's Day bowl games (an established situation) and (3) other network programing of a "special" nature which is neither sports events nor motion pictures.

Report and Order, supra, paragraph 110.

When the Access Rule was adopted it survived Constitutional challenge because insofar as it restricted any rights, those rights were of a lower priority than others which it advanced. Mt. Mansfield Television, Inc. v. F.C.C., supra. Because the rules there adopted in no case affected what could be seen, but only when, the established Constitutional imperative behind the generalized restraints on speech which they incorporated ended any First Amendment enquiry.^{143/} The exemption rules at issue here, however, fail not only in the threshold sense that the sum effect of these and all the other rules adopted is to defeat that same Constitutional imperative (See Arguments IIA and B, supra) but also in that the exemptions in fact specifically operate to restrict "what the public will see or if the public will be permitted to see certain features." United States v. Paramount Pictures, 334 U.S. 131, 167 (1947). It is well established that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

However, in applying these general propositions in the particular area of broadcast speech, the mandate of the First Amendment must be read in light of the public interest standard of the Act since "the power to refuse

^{143/} It should be noted in this connection that the only situation in which the original Access Rule could have operated to limit what was seen was specifically obviated by the unchallenged exemption for on the spot coverage of fast breaking news events. (47 C.F.R. §73.658(k)(2)).

a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming." Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1095. The particular delicacy of the Commission's task is inherent in that same conveyance of power because "it is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike." ^{144/} For this reason "the 'public interest' standard necessarily invites reference to First Amendment principles." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 122 (1973). Thus in exercising its power over speech pursuant to its public interest mandate:

. . . the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties -- e.g., to strike a balance between the various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made.

Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1095.
(footnotes omitted).

^{144/} Id., quoting in a footnote the text of 47 U.S.C. §326, which provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship. . . , and no regulation or condition shall interfere with the right of free speech by means of radio communication.

In its adoption of the presently challenged exemptions the Commission has slipped off both sides of its First Amendment tightrope. While the fact that it has gone beyond the specification of "general affirmative duties. . . is not in itself a vice," when the Commission does choose, as here, to make specific findings as to programs which are and are not in the public interest, its "rulings must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship." Banzhaf v. F.C.C., *supra*, 405 F.2d 1082, 1096. Particularly is this so when the regulations at issue have the effect of "diluting licensee responsibility." Columbia Broadcasting System, Inc. v. D.N.C., *supra*, 412 U.S. 94, 131.

In undertaking such a scrutiny there is at the threshold a "high risk that such rulings will reflect the Commission's selection among tastes, opinions and value judgments, rather than a recognizable public interest." Banzhaf v. F.C.C., *supra*, 405 F.2d 1082, 1096. Moreover, "with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." *Id.* The "problem of critical importance" with which reviewing courts must at the outset "come to grips" in dealing with "broadcast regulation and the First Amendment" is "the rise of an enlargement of government control over the content of broadcast discussion . . . " Columbia Broadcasting System, Inc. v. F.C.C., *supra*, 412 U.S. 94, 126.

Where, as here, the challenged regulations are specifically designed to favour some speech over other (by allowing exemptions for certain speech and not other speech and by permitting any exemptions as against all access programs) and to impose an outright ban on certain speech otherwise allowed (documentaries with a contest formula), such a "system of prior restraints comes to this Court bearing a heavy presumption against its Constitutional validity" Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); See also

Near v. Minnesota, 283 U.S. 697 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). " New York Times Co. v. Sullivan, 403 U.S. 703, 714 (1971).

In determining whether the Commission bore that "heavy burden" in the Report and Order adopting the presently challenged restraints, it is again Judge Bazelon in the Banzhaf opinion, supra, who specifically lays out the appropriate analysis for a Commission regulation. The first step is to define the specific power which the Commission asserts as justifying its adoption of the regulations at issue. Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1101. In Banzhaf the relevant power was very narrowly and specifically defined by the Commission itself: public health. Id. In this case the Commission in fact never defines the power under which it acts, simply alluding from time to time to its ultimate judgment that whatever rules it has adopted meet "the demands of the public interest." Report and Order, supra, paragraph 81. Under those circumstances the law is clear that its entire ruling is void ab initio since it "'sweep[s]... widely and... indiscriminantly' across protected freedoms." Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1101 (citing Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964)). (See Argument II B, supra).

In order to reach even an arguendo assumption that the exemptions adopted in the Report and Order have survived to face the present scrutiny, this Court must decide for itself what power the Commission would have relied on had it relied on a power, because it is in light of that power alone that the Commission can be found to have carried its "heavy burden" of establishing the constitutionality of the exemptions. Id. It would appear from the Commission's discussion in connection with the various rules adopted that if it had defined the power under which it deemed itself to be acting, that power would have been defined essentially as encouragement of programs which the Commission deemed to be of higher quality than those now shown by some stations during access time.

In examining what the Commission did pursuant to its assumed program improvement power, the initial question is whether its action had the effect of banning any speech. Id. Here, unlike the factual situation presented in Banzhaf, the challenged regulations do in fact undertake to ban specific speech. They do this in two ways.

First, and most specifically, 47 C.F.R. §73.658(k)(1)(ii) defines a documentary, for purposes of the exemption in subsection (1)(i), as "any program which is non-fictional and educational or informational" and then provides that if such a documentary has a format wherein "the information is used in a contest among participants", it is not entitled to the same exemption extended to all other documentaries. Thus to single out an isolated aspect of a particular expressive work, find that aspect objectionable, and therefore ban the work itself would be impermissible under long settled law even if the isolated aspect at issue were not itself definable as protected speech within the meaning of the First Amendment. Thus, for example, if the expressive work at issue were a book, and if it did in fact contain a specific passage found to be obscene and therefore in and of itself not entitled to the protection of the First Amendment, the book itself, including the obscene and individually unprotected passage, would be entitled to the full protection of the First Amendment unless the book, taken as a whole, came within the applicable standards for identification of obscene books. Miller v. California, 413 U.S. 15, 24 (1973).

In adopting its present ban, then, the Commission has accorded a lower standard of protection to "educational or informational" television programs than the Supreme Court accords to books containing unprotected obscenity. Nor is the effect of this ban on permissible editorial judgments limited to what may be produced or what may be exhibited; the most repugnant aspect of this ban is that the rejected format is one of

the very few educational formats which can serve the viewing audience by directly involving it in the program itself.^{145/} Moreover, this legislative expression of the Commission's distaste for a particular format is rendered even more inexplicable in view of the fact that it has heretofore avoided the subject of format, even in the licensing context, where its power to intervene is greatest,^{146/} even to the extent of declining in that context to consider the views of audiences about the overall formats of stations in their own communities, a deference to licensees which needless to say is as improper as the deference here paid networks in finding the Access Rule a restraint, since in both cases it involved ignoring the paramount rights of the public in order to honour subordinate rights. See, e.g., Citizens Committee v. F.C.C., D.C. Cir. Case No. 73-1057, decided November 15, 1973; Citizens Committee v. F.C.C., 436 F.2d 263 (D.C. Cir. 1970).

The second, and general, way in which all of the cited exemption provisions ban speech is by their exclusion of all program types not coming within one of the exemptions. This of course is an act of censorship unique to the present version of the access regulations since the restraints of the original Rule were wholly structured around time of exhibition, whereas all of the Evening Programming Requirements are wholly centered around what is exhibited, even to the extent that rules which in their terms are based on considerations of time are in their justification based on judgments as to type and quality of programs. See

^{145/} / As for example with CBS' highly touted National Drivers' Test a few years ago; the various local and national academic contests among high school and college students; an educational program for elementary children such as is used in hundreds of schools which follow the format of a now banned show called Password; and perhaps even such programs as educational television's The Advocates, where listeners are polled on important issues, since a "contest" is itself wholly undefined and therefore cannot be assumed to exclude any activity which involves "winning" and "losing."

^{146/} See Banzhaf v. F.C.C., *supra*.

United States v. Paramount Pictures, supra, 334 U. S. 131, 167. Once the Commission has thus structured its access regulations on the basis of what kind or quality of program can/should be shown, it follows necessarily that those not included are excluded. ^{147/}

Because the threshold and essential characteristics of the rules render them outright bans on constitutionally protected speech, a dispositive finding of unconstitutionality is in fact mandated under the first test of the Banzhaf case, supra.

Had the challenged exemptions survived to face the second test of Banzhaf, they would have fared no better, for each of the exemptions in one way or another has a "chilling effect" on the exercise of First Amendment freedoms" ^{148/} by network program producers, off-network program purveyors, access producers, licensees and the public itself. This chilling effect is engendered either by the fact that an exemp-

^{147/} In point of fact there is an additional problem here as well because the Commission does not in fact stop at the illegal function in support of which its program improvement power is asserted; rather, having made its quality judgments, it then effectively relates them to program sources (since it is well established that to offer entry to network material is to de facto deny it to non-network material), thus in practice effectuating its ban on television programs through bans on producer groups. To ban television programs by producer groups because other producer groups make "better" programs is (to ignore the Commission's own denial of jurisdiction or expertise to act for or against producers specifically, as well as the grave question of equality of treatment under the laws) a pursuit whose indulgence would in fairly short order leave but one program source on television.

^{148/} Banzhaf v. F. C. C., supra, 405 F.2d 1082, 1101.

tion is wholly undefined^{149/} or the fact that it is defined in terms so vague as to render the definition useless.^{150/}

The chilling effects of these incomprehensible exemptions will be felt somewhat differently by each affected entity. Networks will either refrain from producing shows apparently not included within the definitions or -- and more likely in view of the absence or apparent breadth of the definitions in most cases -- will in fact attempt to widen them still farther through applications to the Commission for clarification with respect to particular plans in advance of production. The Commission will in that event be put, as a government agency, in the same position as the networks now are by their own admission, with respect to their house producers -- controlling (albeit in the Commission's case perhaps to a more limited extent -- but not by any necessary limits inherent in the power) "every stage of a production from idea through exhibition" (See footnote 16, supra). The networks will in effect become petitioners for prior restraints, if they wish maximum commercial success through maximal invasion of access time.

^{149/} Undefined exemptions are granted for "children's specials" (exclusively directed to children -- Sesame Street? designed to attract a primarily children's audience -- Wild Wild West? approved for children by someone and if so whom? "family entertainment" such as that for which the Access Rule was revoked on Sunday? and, how many specials make a series?); "public affairs programming" (given existing exemptions for documentaries, see next footnote, on-the-spot news, fast breaking news events, and programs relating thereto, what remains to be public affairs and/or which is which?); certain "programming of a 'special' nature" excluding domestic sports except for some, and movies, but including specified international sports events and perhaps others (what is special? how often can it happen? how many parts can it have in any one evening?); "programming related to "on-the-spot news or news coverage of fast breaking events (in what manner related? how many days in the same week can the news generally, or a specific news event give rise to a "related" program?).

^{150/} The only defined exemption is "documentary" and its definition raises questions as difficult as would lack thereof (what is nonfiction, e.g. Shakespeare's history plays, a staged historical event, a fictional story about a real person or event? What is educational/informational and who decides?).

The purveyor of existing off-network programs of course starts at the point of petitioning for Commission examination of an existing show to see if it can be fitted within one (or more) of the exemptions. Nor is the vision of these multiple prior restraints a matter of hypothetical "borderline cases" imagined by "ingenuity."^{151/} The very definitional problem now legislated into respectability by these exemptions has been endemic since adoption of the original Access Rule because the Commission has waived both the Rule and its off-network corollary for most of these reasons^{152/} in the face of multiple oppositions and a presently pending court appeal with respect to one such waiver.^{153/} The present lengthy list of officially approved but wholly meaningless grounds for further such actions can only bring more of the same.

Independent producers will reflect the chilling effects of these exemptions on their performance by exercising the greatest caution, in the interest of bare survival, to avoid all areas approved by the Commission, since for them producing in the approved category only means competing with network product. This restraint is perhaps the most absurd: given the already legislatively expressed criterion for survival of what remains of the Rule, program quality as defined by program type, and given that all the program types defined as high quality must be avoided

^{151/} Lafayette Radio Electronics Corp. v. F. C. C., supra, 345 F.2d 278, 279.

^{152/} By legislating into exemptions sweepingly general criteria whose only conceivable defense in the context of waiver grants was that each was limited to an ad hoc situation, the Commission has, if possible, increased the constitutional vulnerability of its judgments since "standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 432, 433 (1963); See also Banzhaf v. F. C. C., supra.

^{153/} NAITPD v. F. C. C., appeal pending, D. C. Cir. Case No. 73-2052.

by the access producer to survive today, the Commission has put him in the position of inviting his destruction tomorrow through total Rule repeal based on his failure to commit suicide.^{154/}

The licensee's response to these Rules, much like the network's, can take either or both of two equally constitutionally repugnant forms: rejection of programs arguably not exempt, or requests for prior Commission censorship to clarify the matter of their exempt status.

The combined weight of all of these improprieties at every stage in the life of a program is of course borne by the public, which loses its opportunity to see every program anyone refrained from making/selling/buying for any of the various applicable reasons and to which comes in full measure the distilled product of Commission prior censorship at every stage in the life of an indeterminate number of other programs.

The third and final test set out in Banzhaf, supra, is particularly interesting as applied to this case because despite the fact that failure to meet each of the three tests obviates analysis in light of the next, each here in fact offers new and more frightening glimpses into the regulatory Hell effectuation of these rules would engender. Thus the third test enquires into whether the relevant Commission restraint has the effect of repressing information. Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1103. In Banzhaf this was the last test passed and with flying colours because the entire premise of the ruling was to require dissemination of information in an area, smoking and health, central to the public health power pursuant to which the ruling was issued. Here, on the other hand, the Commission's twice failed rules perform as consistently as those in Banzhaf but to a very different end. For the sum effect of these Rules is not just to suppress information to the extent that the exemptions ban certain programs and have a chilling effect on the pro-

^{154/} And the ultimate irony is that he could not even sacrifice profit for virtue and make these programs at a loss to win approval, since the Commission has rejected the standard of what is produced as a measure of the Rule's success, preferring to look only at what is bought by stations. See Argument II B, supra. Under these exemptions that must overwhelmingly be network product.

duction of others. The damage goes far deeper and it does so precisely because, unlike the situation in Banzhaf, the power invoked in justification of the actions taken is as constitutionally bankrupt as the actions themselves and as little related to the Commission's proper goals.

For these reasons the effects of its invocation spread far beyond its ostensible function, doing the deepest harm to the most central purpose for which the Commission was created in the first place. A government control instituted to prevent subordination of the public interest to monopolistic domination has been betrayed by its trustee to the end of replacing monopolistic domination with government domination.^{155/} The sum effect of all these rules, whether they require or suppress, encourage or restrain, is found not in what they do but why they do it: to bring to the public over every station in the country -- or for now at least, over every network affiliated station in the Top Fifty markets -- those programs deemed most suitable by the members of the Federal Communications Commission.^{156/} It was primarily to guard against precisely such an eventuality as this that the First Amendment itself was found essential.

^{155/} F. C. C. v. Pottsville Broadcasting Co., supra, 309 U. S. 134, 137.

^{156/} And members it must be, because the effects of invocation of any wholly subjective standard cannot but reflect the personal tastes of individuals.

III. THE EFFECTIVE DATE PROVISION OF THE EVENING PROGRAMMING REQUIREMENTS RULE IS INDEPENDENTLY UNREASONABLE IN LIGHT OF THE COMMISSION'S CONTINUING INTENT TO ENCOURAGE INDEPENDENT SYNDICATION IN THE REMAINING CLEARED TIME.

The Commission's intention to increase overall network dominance by returning most of the presently cleared time to network producers was not accompanied by either an affirmative finding or even an implication that the independent productions which presently fill all of access time should wholly disappear. On the contrary, these changes are regarded by the Commission as "improvements"^{157/} in a Rule which "has not yet had a fair test as to its potential,"^{158/} and which should therefore be kept partially intact "in view of the benefits accruing, such as stimulation of local programming efforts, a return to individual licensees of a portion of the decision-making process as to prime time, and opportunity for producers, not choosing to operate through the networks." Report and Order, supra, paragraph 91.

Withdrawal from licensees of most of their right to engage in the "decision-making process" and withdrawal from access producers of most of their "opportunity" are manifestly not designed to encourage either in performance of the cited functions. Nor have they so far been much encouraged to those ends in view of the fact that the Rule has, up to now,

^{157/} Report and Order, supra, paragraph 113.

^{158/} Report and Order, supra, paragraph 94.

had "an adverse life psychologically,"^{159/} having been only partially effective for one year; put into question by this case in the third week of its second; and subject to massive grants of waiver throughout the period. Manifestly, under these circumstances, effectuation of the Commission's continuing intent to "preserve considerable potential for the development of first run syndicated programing,"^{160/} calls for something stronger than a recitation of that intent in the very Report and Order which eviscerates the Rule. See, S.E.C. v. Chenery Corp. 332 U.S. 194, 203 (1947). Instead, however, the Commission has in effect put a condemned sign on the few access slots which remain. It has one this in part by virtue of the fact, already discussed in earlier arguments, that the few time slots which do remain are themselves uncertainly available from week to week so that a regular access show may often be preempted for a "non-network network show" pursuant to 47 C. F. R. 73.658(k)(1)(i) or (2)(i) or (ii) or (iii) or (iv) or (v);^{161/} without any hope of at least

^{159/} Report and Order, supra, paragraph 82.

^{160/} Id.

^{161/} While 47 C. F. R. 73.658(k)(2)(vi) appears in the rule with the 5 "non-network network show" definitions, it is not in fact the same, being simply another way of achieving the purpose served by a provision in the existing Rule which defines a "network" for purposes of the Access Rule and its two companion rules, as one of the 3 major national, commercial networks whose monopoly is in fact at issue. See 47 C. F. R. 73.658(j)(4).

being rescheduled.^{162/} However, that discouraging action, in the Commission's view of matters, was fundamental to its decision and therefore what it would presumably deem an unfortunate necessity insofar as its intent of encouraging networks to the same extent discouraged syndicators.

There is yet another way, however, in which the Commission wrote its notice of condemnation, and a way which was in no manner essential to retention of the integrity of its new regulatory scheme. That other way was by providing for an effective date so precipitate as to cause severe and irreparable injury to all those who have so far ventured into the access marketplace. While the fact that the Commission invited those producers into the marketplace and then in effect denied them permits to sell their wares, renders the effective date provision inequitable and for that reason alone improper,^{163/} the greater defect of the provision is not its unfairness, but its imprudence in light of its operation as a danger sign to anyone otherwise disposed to accept the new invitation

^{162/} As previously noted, one drastic effect of legislation of access time and loss of Sunday, coupled with multiple new exemptions, is to increase the need for a measure now unavailable, whereby the show victimized by preemptions was rescheduled for a later time or day. This situation NAITPD exemplified by the show Hee-Haw, which even under the existing Rule was preempted sixteen times in less than half a season in its Saturday time slot by stations which broadcast it instead in those weeks on Sunday. Ironically, that damaging kind of procedure, of which many "pro-Rule" parties, including NAITPD, complained and for which they suggested several remedies, would undoubtedly now be welcomed since it is generally preferable to be crippled than killed.

^{163/} NAITPD's Stay Petition, already filed with this Court, sufficiently discusses this aspect of the matter, which denial of the stay manifestly does not moot.

II 4

extended in the present Report and Order.^{164/} Manifestly, if the Commission's very first look at its new Rule resulted in immediate cancellation of most of that Rule, any further looks by those already jaundiced eyes could not be expected to result in changes less rapidly implemented. Particularly is this so in light of the fact that the only immediately relevant precedent before the Commission this time, in terms of what constitutes orderly procedure for effectuation of rules of this sort, was the Access Rule itself. It was adopted in May, 1970 with a designated initial and partial effective date of October, 1971 and a fully effective date of October, 1972, in order to be fair to private parties whose program monopoly was deemed to be anticompetitive and an infringement of the First Amendment rights of the public. The Report and Order is silent on the question why that precedent was neither fully nor even "50%" controlling -- all that injured private parties sought this time.

^{164/} And lest this warning be discounted there remain the dissents by way of concurrence of two Commissioners: the Chairman, who, unmoved by the availability of a new record, attached his dissent to adoption of the original Rule, concurring now only "because today's action might have been worse;" and Commissioner Reid, who "believe[s] that the total repeal of the rule would have been much more in the public interest" but who "fully appreciate[s] the fact that one must accept realities as they occur" and then commends that latter advice to independent producers by concluding:

Since the compromise evidenced by this document seemed to be the closest to total repeal that could be obtained, I decided to concur in its adoption. I want to be absolutely certain however that proper notice is given, here and now, to those who have supported the prime time access rule in the past that unless something better is given to the viewing public than that which has been given in the past few years, then I firmly believe that the public interest would best be served by a complete repeal of the rule.

A prospective syndicator can only assume that making a program the Commission dislikes is twice as suicidal as being a monopolist who defeats the ends of the Communications Act and the First Amendment. Moreover, the Commission has made it impossible for him to produce programs it definitely does like, by requiring him in such cases to compete with network and off-network product newly exempted from the Access Rule, a situation which the Commission has already held confers an "insurmountable"^{165/} competitive advantage on the network or off-network program. Thus, except for knowing that he cannot safely make a game show -- although he does not know why, unless because it costs less than some other programs or because game shows are too popular with the public and therefore perhaps unhealthy -- he is at his peril and without guidance.

If under these circumstances there remains a would be producer still willing to enter the access market with a show not now already sold or committed to production, he is a man so dangerously devoid of reasonable business judgment as probably to be unable to produce or market a show in the first place.

^{165/} Network Television Broadcasting, supra, 23 F. C. C. 2d 380, 386.

The Commission's failure to consider the impact of its effective date provision on the whole class of producers^{166/} to which it looks for not only continued, but also improved, access programming under the new rules, renders the conclusion inescapable that if the substantive provisions adopted in the Report and Order are reasonable, then the effective date provision is unreasonable because its necessary effect is to render achievement of the goals of those substantive provisions impossible. Nor need this Court look beyond the Commission's failure to consider the impact question in holding its effective date provision unreasonable, because the only affirmative reason given therefor by the Commission is itself unacceptable as a matter of law. See S.E.C. v. Chenery Corp., supra.

The only cited reason for what in practical effect amounts to instant implementation of the new rules is that barring network product from prime time is a restraint on licensee freedom to show network material in that time period, "whose maintenance to the full extent it now exists we cannot find to be justified." Report and Order, supra, paragraph 116. This holding inexplicably and therefore impermissibly reverses two specific judgments underlying adoption of the Access Rule: that while the networks de facto do restrain licensee freedom to select

^{166/} Nor, of course, did it consider the effect on specific members of that class who were in fact before it. Ironically, in discussing the Rule's potential the Commission noted with approval new program entries by "two of the industry's more powerful entities" (NAITPD members Metromedia and Filmways) both of whom have either already cancelled or project disaster for their major access program entries -- indeed, in the case of Filmways, for the very show lauded by the Commission. See Report and Order, supra, paragraph 90.

other than network product in prime time,^{167/} the Access Rule defeats that restraint without imposing the alternative restraint of either de facto or de jure requiring use of syndicated access material;^{168/} and that while the Rule is a restraint on licensees, networks and major studios to the extent that it bars one program choice because that would be the only choice made if available, that restraint is necessary to remove a restraint on the paramount right of the public to receive programs from more than the three network sources exclusively available absent the Rule.

The Commission ignores the first point by asserting the very same thing in revoking the Rule that it did in adopting it: that the changes^{169/} involved are "permissive not mandatory". While that statement was meaningful in its original context in that no non-network program source was in a position which enabled it to "pressure" affiliates once they were freed of the leverage exercised by their networks, its use in the present context is wholly meaningless. As a legal matter it is not only true but necessarily true that network reentry under these rules is

^{167/} See, e.g., Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 386-87; Order on Reconsideration, supra, 25 F. C. C. 2d 318, 329-30.

^{168/} In 1970 the Commission noted in this regard that "under the rules we are adopting no television licensee can be required to carry a syndicated program if he chooses not to do so. He may rely on his own program ingenuity or use locally originated programs to fill out his schedule." Network Television Broadcasting, supra, 23 F. C. C. 2d 382, 397.

^{169/} Report and Order, supra, paragraph 84, footnote 36.

permitted rather than required, since to require it would violate the option time rules which prevent network arrangements which actually or in effect hinder licensee freedom to select other than network programs.^{170/} However, insofar as "permissive" is used to refer to the practical effect of the new rules, it is patently a misnomer since it remains the case that if network programs can be used, they will be used. Were that not so, the Access Rule need never have been written or, if written and mooted by a change in that situation, it could here have been revoked.

The Commission does not even offer an unacceptable reason for its reversal of the second judgment underlying initial adoption of the Access Rule, the judgment that its modest restraint was mandated to

^{170/} 47 C. F. R. 73.658(d) and (e) provide:

(d) Station commitment of broadcast time. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with any network organization, which provides for optioning of the station's time to the network organization, or which has the same restraining effect as time optioning. As used in this section, time optioning is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

(e) Right to reject programs. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest, or (2) substituting a program which, in the station's opinion, is of greater local or national importance.

lift the greater restraint otherwise placed on the public's paramount First Amendment right of access to programs from diverse and antagonistic sources. While the intent of each of the new rules was to increase network dominance (see Argument IB, supra), that intent was not accompanied by a general rejection of the principles underlying the Access Rule and they therefore remain controlling insofar as the new rules include continued provision for some access time periods.^{171/} Accordingly this Court's rejection of the argument of the networks in the Mt. Mansfield case remains controlling, despite the fact that the Commission has now accepted the networks' view of First Amendment priorities, a view now indisputably erroneous. Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 395 U.S. 367, 390.

In rejecting the contention that its restraining effect on networks and/or network program producers and/or licensees invalidated the Access Rule, this Court explained the necessity of that restraint to "open up the media to those whom the First Amendment primarily protects -- the general public." Mt. Mansfield Television, Inc. v. F.C.C.,

^{171/} To the extent there is anything irrational in these two judgments existing side by side, that reflects solely on the adoption of those rules which reinstitute the monopoly, not on the retention of those which reduce it. While the present argument assumes the two judgments can co-exist in the same document, that is manifestly an assumption arguendo only. See Arguments I and II, supra.

supra, 442 F.2d 470, 478. If clearing the occasional half hour which still remains of access time also still removes a restraint which impedes effectuation of the First Amendment's mandate, it cannot at the same time be true that returning the rest of the time previously cleared to the networks likewise removes a restraint which impedes effectuation of that mandate. And removal of any lesser order of restraint -- even assuming it to be permissible at all -- manifestly cannot be so crucial as to be done in a manner which will eventuate in destruction of the purpose for which some time still remains cleared. Such a result on such reasoning is inevitable if these rules are effectuated in September 1974. The entirely severable portion of the Evening Programming Requirements Rule which so provides is accordingly unreasonable and unlawful, and its reversal is mandated by this Court's duty to "judge the propriety of such an action solely by the grounds invoked by the agency." S. E. C. v. Chenery Corp., supra, 332 U. S. 194, 196. The Commission should therefore be required to provide a more reasonable effective date even if effectuation of these Rules is not in and of itself unlawful.

CONCLUSION

For the reasons stated above, the Report and Order under review, adopting amendments to the Prime Time Access Rule, should be set aside.

Respectfully submitted,

KATRINA RENOUF
MARGOT POLIVY
EDWARD J. KUHLMANN

Renouf, McKenna & Polivy
1532 Sixteenth Street, N. W.
Washington, D. C. 20036

March 21, 1974

APPENDIX A

Effective September 1, 1974, paragraph (k) of Section 73.658, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Evening programming requirements. The provisions of this paragraph apply to stations in the top-50 U.S. television markets (see NOTE below) which are regular affiliates of, or commonly owned with one of the three national television networks (as defined in paragraph (j) of this section), with respect to their evening programming starting on the date between September 1 and October 1, 1974, which their network designates as the start of its "new season".

(1) After such date in September 1974, each station shall devote not less than six (6) half-hours between 7:30 p.m. and 8:00 p.m. E.T. and P.T. (6:30 and 7:00 p.m. CT and MT) Monday through Saturday to programs which are not network, off-network or feature film; Provided, however, That;

(i) one (1) of these six (6) half-hours each week may consist of children's specials, documentaries or public affairs programming, either network originated or off-network.

(ii) "Documentary" programming means any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants.

(2) The following types of material are not considered "network programming" for purposes of this paragraph, so that they may be presented without limitation during the Monday-Saturday time periods mentioned in subparagraph (1) hereof:

(i) "Runovers" of sports events carried on the network during late afternoon or early evening hours, if the telecast of the event (and accompanying pre-game and post-game material, if any) is scheduled so that in the normal course it would be concluded by 7:00 p.m., ET.

(ii) For stations in the Mountain and Pacific time zones, the "live" broadcast of any "simultaneous" network programming, such as sports events or some other special events, which are broadcast simultaneously throughout the 48 contiguous states; provided the network's schedule for the evening including such telecasts complies with the provisions of this paragraph with respect to stations in the Eastern and Central time zones.

(iii) Telecasts of an international sports event such as the summer or winter Olympic games, New Year's Day college football games, or any other network programming of a "special" nature other than sports events or motion pictures, when the network devotes all of its time after 8 p.m. E.T. or P.T. (7 p.m. C.T. or M.T.) the same evening to the same programming, or all of it except brief incidental "fill" material.

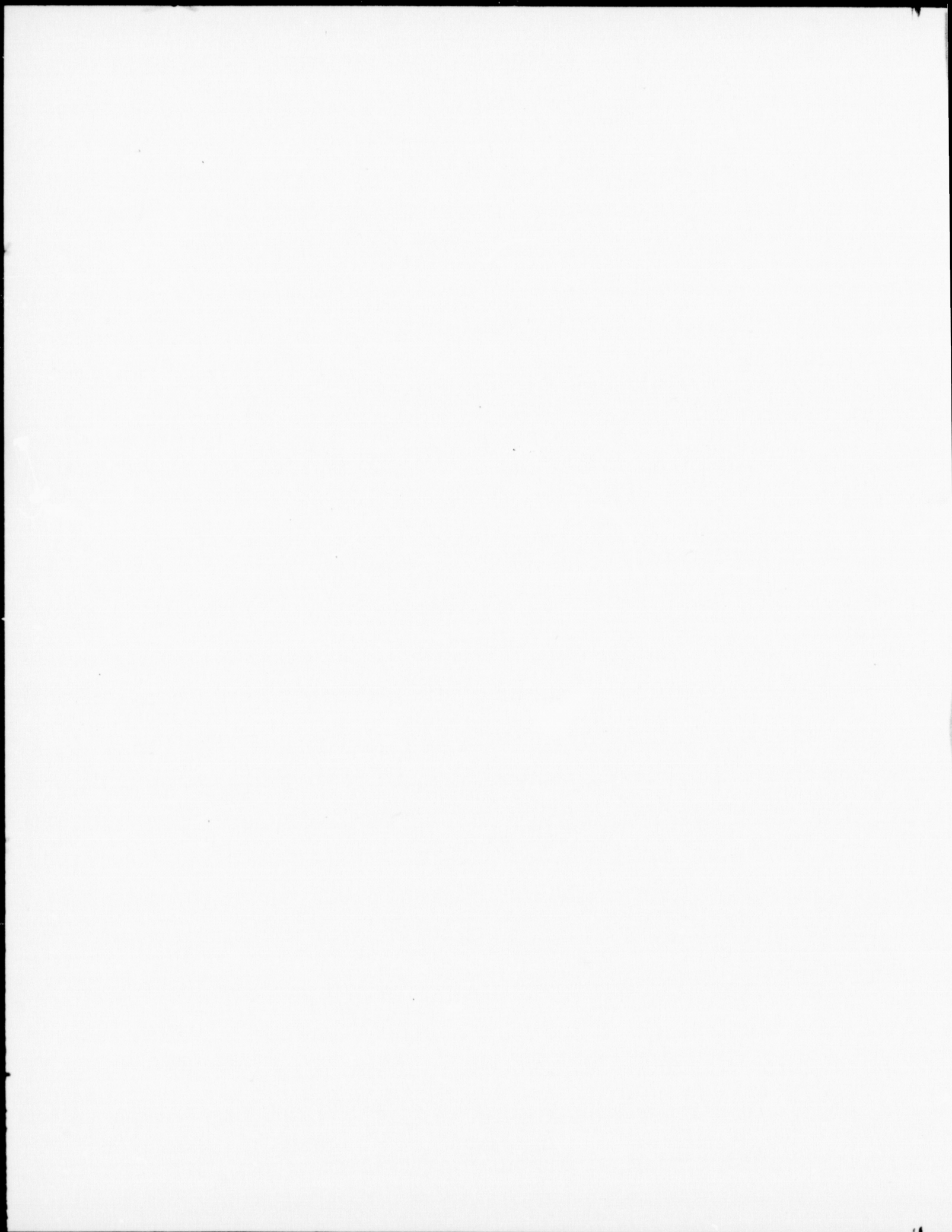
(iv) "Pre-game shows" in connection with important sports events carried by the networks (e.g., the World Series), on no more than five occasions per broadcast year.

(v) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or programming related to such events, and political broadcasts by or on behalf of legally qualified candidates for public office.

(vi) Material carried on a commercial or other network other than the three national networks as defined in paragraph (j) of this section.

(3) For those portions of the Eastern and Central time zones where "daylight saving time" is not observed for part or all of the year, during the portion of the year when it is not observed, the times which must be "cleared" of network, off-network and other feature film material shall be one hour earlier than those specified in subparagraph (1) of this paragraph, except for stations which regularly delay network evening programs and rebroadcast them an hour later.

NOTE: For the purpose of this paragraph, the "top 50 U.S. television markets" are the 50 largest markets, in terms of average prime-time households, listed each year by the American Research Bureau (ARB) in its publication Television Market Analysis. Shortly after this publication is issued, the Commission will issue a public notice setting forth the top 50 markets as indicated in that publication. This listing will apply for the following "broadcast year", that period of about twelve months starting the following September on a date which each network designates as the beginning of its "new season".



CERTIFICATE OF SERVICE

I, June Holdridge, do hereby certify that copies of this Brief for
Petitioner have been mailed first class, postage prepaid, this 21st
day of March 1974 to:

Joseph A. Marino, Esquire
Associate General Counsel
Federal Communications Commission
Washington, D. C. 20554

J. Roger Wollenberg
Wilmer, Cutler & Pickering
Attorneys for Columbia
Broadcasting System, Inc.
1666 K Street, N. W.
Washington, D. C. 20006

Howard Monderer
National Broadcasting Company, Inc.
1800 K Street, N. W.
Washington, D. C. 20006

James A. McKenna, Jr.
McKenna & Wilkenson
Attorneys for American
Broadcasting Companies, Inc.
1150 Seventeenth St., N. W.
Washington, D. C. 20036

Richard L. Barovick
Hardee Barovick Konecky & Braun
Attorneys for Time-Life Films, Inc.
300 Park Avenue
New York, N. Y. 10022

Howard Shapiro, Esquire
Antitrust Division
Department of Justice
Washington, D. C. 20530

Stuart Robinowitz
Paul, Weiss, Rifkind, Wharton
& Garrison, Attorneys for
Columbia Pictures Industries, Inc.
345 Park Avenue
New York, N. Y. 10022

Stuart Robinowitz
Paul, Weiss, Rifkind, Wharton
& Garrison, Attorneys for
Warner Brothers Corporation
345 Park Avenue
New York, N. Y. 10022

Arthur Scheiner
Wilmer & Scheiner
Attorneys for MCA Inc.
2021 L Street, N. W.
Washington, D. C.


June Holdridge